

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.1 Overview



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NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

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WHAT YOU WILL LEARN

The World Trade Organization (the “WTO”) was established and became operational on 1 January 1995. It is the youngest of all major international intergovernmental organizations and yet, it is arguably one of the most influential in these times of economic globalization. It has also been one of the most controversial and contested international organizations. To date, the most successful feature of the WTO has been its dispute settlement system. Some of the disputes dealt with by the WTO dispute settlement system have triggered considerable public debate and have attracted much media attention. This has been the case, for example, of the dispute on the European Union’s preferential import regime for bananas¹, the dispute on the European Union’s import ban on meat from cattle treated with growth hormones², the dispute on the United States’ import ban on shrimp harvested with nets not equipped with turtle excluder devices³, the dispute on the United States’ special tax treatment of export-related earnings⁴, the dispute on a French ban on asbestos⁵, and most recently, the dispute on the United States’ safeguard measures on steel.⁶ Many of these disputes involve, directly or indirectly, developing countries.

This Module is the first of four on the dispute settlement system of the WTO. It gives a general introduction to the WTO and then describes the basic features of the WTO’s dispute settlement system. Particular attention is given to the position of developing countries in both the WTO in general and its dispute settlement system in particular. Subsequent modules in this Course deal with specific elements of the WTO dispute settlement system: the panel process (Module 3.2), the appellate review process (Module 3.3) and the implementation of recommendations and rulings (Module 3.4).

The first Section of this Module describes the origins of the WTO, its objectives, functions, institutional structure, membership and decision-making procedures. The second Section examines the basic rules of WTO law and policy, such as the non-discrimination principles, the market access rules and the fair trade rules, as well as the exceptions to these rules on economic and non-economic grounds. The third Section describes the position of developing country Members in the WTO system and the special and differential treatment these

¹ European Communities - Regime for the Importation, Sale and Distribution of Bananas (“EC – Bananas III”), *complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (DS27)*.

² EC Measures concerning Meat and Meat Products (Hormones) (“EC – Hormones”), *complaints by the United States (DS26) and Canada (DS48)*.

³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products (“US – Shrimp”), complaint by India, Malaysia, Pakistan and Thailand (DS58)*.

⁴ *United States – Tax Treatment for “Foreign Sales Corporations” (“US – FSC”), complaint by the European Communities (DS108)*.

⁵ *European Communities – Measures Affecting the Prohibition of Asbestos and Asbestos-Containing Products (“EC – Asbestos”), complaint by Canada (DS135)*.

⁶ *United States - Definitive Safeguard Measures on Imports of Certain Steel Products, complaints by the EC, Japan, Republic of Korea, China, Switzerland, Norway, New Zealand and Brazil (DS248, DS249, DS251, DS252, DS253, DS254, DS258 and DS259)*.

Members enjoy under WTO law. The fourth Section deals with WTO's unique dispute settlement system and examines the origins of the dispute settlement system, its object and purpose, its jurisdiction, the access to the system, the methods of dispute settlement, and the institutions and the proceedings of WTO dispute settlement. The fifth Section addresses the use made by developing country Members of the WTO dispute settlement system and gives an overview of the special rules and procedures provided to allow these Members to use the system more easily and effectively. Finally, the sixth Section, briefly addresses past and current negotiations on the reform of the WTO dispute settlement system.

1. THE WORLD TRADE ORGANIZATION (WTO)

Objectives

On completion of this section, the reader should be able to describe the historical origins of the WTO and the main elements of the *Agreement Establishing the WTO* as well as the policy objectives of the WTO, its functions, its institutional structure, its membership, its decision-making procedures and its budget.

1.1 Origins of the WTO

1.1.1 General Agreement on Tariffs and Trade of 1947

Article XVI:1 WTO

Article XVI:1 of the *Agreement Establishing the World Trade Organisation* states:

Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947.

The origins of the WTO undisputedly lay in the General Agreement of Tariffs and Trade on 1947 (“GATT 1947”). As is clear from Article XVI:1, quoted above, these origins remain relevant because the decisions, procedures and customary practices of the GATT 1947 still guide the WTO in many of its actions.

ITO

In 1946 negotiations were started in London at the initiative of the United States on the establishment of an international organization for trade to complete the Bretton Woods structure of international economic institutions already consisting at the time of the World Bank and the International Monetary Fund. The negotiations on the Charter of the International Trade Organization (the “ITO”) were continued in Geneva in 1947. In parallel with the negotiations on the ITO Charter, countries also negotiated in Geneva on the reduction of tariffs and on general clauses to protect the agreed tariff reductions. The latter negotiations were successfully concluded in Geneva and resulted in the General Agreement on Tariffs and Trade of 1947. While the GATT 1947 was intended to be the first agreement concluded under the auspices of, and administered by, the ITO, the negotiators were not able to reach agreement on the ITO Charter in Geneva in 1947. It was decided, however, to apply the GATT 1947 on a provisional basis while waiting for the completion of the negotiations on the ITO Charter. In Havana in 1948, agreement was reached on the ITO Charter. However, in the following years the United States Congress refused to approve the Charter and consequently the ITO was never established.

GATT

The demise of the ITO left an important gap in the Bretton Woods structure of international economic institutions. To handle problems relating to their trade relations, countries would as from the early 1950s onwards, turn to the only existing multilateral “institution” for international trade, the GATT 1947. Although the GATT was conceived as a multilateral *agreement* for the reduction of tariffs, and *not* an international *organization*, it would over the years successfully “transform” itself - in a pragmatic and incremental manner - into a *de facto* international organization. In particular with regard to the reduction of tariffs the GATT was very successful. However, it was less successful with respect to the reduction of non-tariff barriers. Negotiations on the reduction of non-tariff barriers are much more complex and, therefore, required among other things a more “sophisticated” institutional framework than the GATT offered. Furthermore, the GATT was only concerned with trade in goods. However, in view of the ever increasing importance of services in the economic activity of many countries, it was clear from the early 1980s that for trade in services multilateral GATT-like disciplines would need to be agreed upon and administered.

1.1.2 Uruguay Round Negotiations (1986-1993)

Uruguay Round

In September 1986, the GATT Contracting Parties decided in Punta del Este, Uruguay, to start a new round of negotiations on the further liberalization of international trade. The agenda for these negotiations was very broad and ambitious and included for the first time trade in services, as well as the very controversial issues of trade in agricultural products and trade in textiles. Also, the improvement of the institutional mechanisms of the GATT and its dispute settlement system was on the agenda. The establishment of a new international organization for trade however, was initially not on the agenda of the Round. It was only in 1990 that the first proposals for the establishment of a new international trade organization were tabled by Canada and the European Community, followed in 1991 by a joint proposal by Canada, the European Community and Mexico. Initially many developing countries were quite critical with respect to the idea of establishing a new international organization for trade, partly because they considered that UNCTAD could and should fulfil this function. Also the United States objected to the establishment of a new international trade organization. In the course of 1992, however, most developing countries became convinced of the appropriateness and the timeliness of a new international trade organization. Only in the final stages of the Uruguay Round negotiations in 1993 did the United States agree to such a new organization.

WTO Agreement

More than seven years after its start in Punta del Este, the Uruguay Round was finally concluded successfully in Geneva in December 1993. In April 1994 the *Agreement Establishing the World Trade Organization* was signed in Marrakesh, Morocco. On 1 January 1995, the *WTO Agreement* entered into force and the WTO became operational.

1.2 The Agreement Establishing the World Trade Organization

The Marrakesh *Agreement Establishing the World Trade Organization* (the “*WTO Agreement*”) is the most ambitious and far-reaching international trade agreement ever concluded. It consists of a short, 16-article long basic agreement establishing the WTO *and* numerous agreements and understandings included in the annexes to this agreement.

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

ANNEX 1

ANNEX 1A: Multilateral Agreements on Trade in Goods

General Agreement on Tariffs and Trade 1994

Agreement on Agriculture

Agreement on the Application of Sanitary and Phytosanitary Measures

Agreement on Textiles and Clothing

Agreement on Technical Barriers to Trade

Agreement on Trade-Related Investment Measures

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

Agreement on Pre-shipment Inspection

Agreement on Rules of Origin

Agreement on Import Licensing Procedures

Agreement on Subsidies and Countervailing Measures

Agreement on Safeguards

ANNEX 1B: General Agreement on Trade in Services and Annexes

ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

ANNEX 3: Trade Policy Review Mechanism

ANNEX 4: Plurilateral Trade Agreements

Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

Article II:2 & 3 WTO

On the relationship between the *WTO Agreement* and its Annexes as well as on the binding nature of the Annexes, Article II of the *WTO Agreement* states in relevant part:

2. *The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as “Multilateral Trade Agreements”) are integral parts of this Agreement, binding on all Members.*
3. *The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as “Plurilateral Trade Agreements”) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.*

Article XVI:3 WTO

Furthermore, Article XVI:3 of the *WTO Agreement* provides:

In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict.

Annexes 1 to 4 WTO

Most of substantive WTO law is found in the agreements contained in Annex 1. This Annex consists of three parts. Annex 1A contains 13 multilateral agreements on trade in goods, Annex 1B contains the *General Agreement on Trade in Services* (the “GATS”) and Annex 1C the *Agreement on Trade Related Aspects of Intellectual Property Rights* (the “TRIPS Agreement”). The most important of the 13 multilateral agreements on trade in goods, contained in Annex 1A, is the *General Agreement on Tariffs and Trade 1994* (the “GATT 1994”). The GATT 1994 consists of the provisions of the GATT 1947, the provisions of the legal instruments that have entered into force under the GATT 1947, six Understandings on particular GATT provisions and the *Marrakesh Protocol* on tariff concessions. The plurilateral agreements in Annex 4 also contain provisions of substantive law but are only binding upon those WTO Members that are a party to these agreements. Annexes 2 and 3 hold respectively, the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and the *Trade Policy Review Mechanism*, and also contain procedural provisions.

1.3 Objectives of the WTO

Preamble WTO

The policy objectives that the WTO is to pursue are set out in the Preamble of the *WTO Agreement*. According to this Preamble, the Parties to the *WTO Agreement* agreed to the terms of this agreement and the establishment of the WTO:

Recognizing that their relations in the field of trade and economic endeavour



should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, ...

The *ultimate* objectives of the WTO are thus the raising of standards of living, the attainment of full employment, the growth of real income and effective demand, and the expansion of production of, and trade in, goods and services. However, it is clear from the Preamble that in pursuing these objectives the WTO must take into account the need to preserve the environment as well as the needs of developing countries. The Preamble stresses the importance of *sustainable* economic development and of the integration of developing countries, and, in particular, least-developed countries, in the world trading system. Both these aspects were absent from the preamble of the GATT 1947. The statements in the Preamble of the *WTO Agreement* on the objectives of the WTO are not without legal significance. In *US – Shrimp*, the Appellate Body stated:

[The language of the Preamble of the WTO Agreement] demonstrates recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.⁷

The preambular statements of the objectives of the WTO contradict the contention that the WTO is only about trade liberalization without regard to environmental degradation and global poverty.

The Preamble also indicates how these objectives are to be achieved. It states:

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction



⁷ Appellate Body Report, *United States – Shrimp*, para. 153

⁸ Article II:1 of the *WTO Agreement*

of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,

Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system [...]

According to the Preamble of the *WTO Agreement* the two main instruments, or means, to achieve the objectives of the WTO are agreements on the reduction of trade barriers and the elimination of discrimination. These were also already the two main instruments of the GATT 1947 but the *WTO Agreement* aims at constituting the basis of an integrated, more viable and more durable multilateral trading system.

1.4 Functions of the WTO

Article 2:1 WTO

In the broadest of terms, the primary function of the WTO is to:

... provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement.⁸

More specifically, the WTO has been assigned five widely defined functions. These functions are set out in Article III of the *WTO Agreement* and are described below.

1.4.1 Implementation of the WTO Agreements

Article III:1 WTO

A first function of the WTO is to facilitate the implementation, administration and operation of the *WTO Agreement* and the multilateral and plurilateral agreements annexed to it. The WTO is also entrusted with the task of furthering the objectives of these agreements. A concrete example of what this function of “facilitating” and “furthering” entails, is the work of the WTO Committee on Sanitary and Phytosanitary Measures (the “SPS Committee”). Article 12 of the *SPS Agreement* states that the SPS Committee shall *inter alia*:

... encourage and facilitate ad hoc consultations or negotiations among Members on specific sanitary or phytosanitary issues. The Committee shall encourage the use of international standards, guidelines or recommendations by all Members and, in this regard, shall sponsor technical consultation and study with the objective of increasing co-ordination and integration between



international and national systems and approaches for approving the use of food additives or for establishing tolerances for contaminants in foods, beverages or foodstuffs.

This function of facilitating the implementation, administration and operation of the WTO agreements and furthering the objectives of these agreements is an *essential* function of the WTO. It involves most of its bodies and takes up much of their time.

1.4.2 Forum for Trade Negotiations

Article III: 2 WTO

A second function of the WTO is to provide a permanent forum for negotiations amongst its Members. These negotiations may concern matters already dealt with in the WTO agreements but may also concern trade matters currently not yet addressed in WTO law. With regard to negotiations on matters already dealt with, the WTO is “the” forum for negotiations while for other negotiations, it is “a” forum among others. To date, WTO Members have negotiated and concluded in the framework of the WTO a few trade agreements providing for further market access in particular regarding services.

At the Doha Session of the Ministerial Conference in November 2001, the WTO decided to start a new round of trade negotiations, commonly referred to as the Doha Development Round. In the Ministerial Declaration, Ministers stressed their “commitment to the WTO as the unique forum for global trade rule-making and liberalization”.⁹ The Ministerial Declaration provides for an ambitious agenda for negotiations. These negotiations include matters on which WTO Members had already agreed in 1994 in the *WTO Agreement* to continue negotiations, such as trade in agricultural products and trade in services (the “built-in” agenda).¹⁰ In fact, negotiations on these matters had already started in early 2000. Furthermore, the Doha Development Round negotiations also include negotiations on matters such as market access for non-agricultural products, dispute settlement, rules on anti-dumping duties, subsidies and regional trade agreements and certain issues relating to trade and the environment. The WTO Members also decided that after the Fifth Session of the Ministerial Conference in 2003, they would start negotiations on the relationship between trade and investment, the relationship between trade and competition law, transparency in government procurement, trade facilitation and issues relating to trade and the environment other than those already the subject of negotiations. At the 2003 Session of the Ministerial Conference, the modalities of these negotiations will be decided upon by “explicit consensus”. In the meantime, the relevant WTO bodies will “prepare” these negotiations by discussing and attempting to clarify the matters that will be addressed in the negotiations.

⁹ Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, para. 4.

¹⁰ Article 20 of the Agreement on Agriculture and Article XIX of the GATS.

With regard to the organization of the negotiations, the Doha Ministerial Declaration states that the negotiations to be pursued under the terms of this declaration shall be concluded not later than 1 January 2005. With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking.

The Doha Ministerial Declaration explicitly states:

*The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.*¹¹

1.4.3 Settlement of Disputes

Article III: 3 WTO

A third and very important function of the WTO is the administration of the WTO dispute settlement system which is detailed below.¹²

1.4.4 Monitoring of Trade Policies

Article III: 4 WTO

A fourth function of the WTO is the administration of the trade policy review mechanism (the “TPRM”).¹³ The TPRM provides for the regular *collective* appreciation and evaluation of the full range of *individual* Members’ trade policies and practices and their impact on the functioning of the multilateral trading system. The purpose of the “TPRM” is to contribute to improved adherence by all Members to the WTO agreements by achieving greater *transparency* in, and *understanding* of, the trade policies and practices of Members.

Under the TPRM, the trade policies and practices of all Members are subject to *periodic review*. The four largest trading entities, i.e., the European Communities, the United States, Japan and Canada are subject to review every two years. The next 16 largest trading nations are reviewed every four years. Other Members, including most developing country Members, are reviewed every six years, except that a longer period may be fixed for least-developed country Members. The trade policy reviews are carried out by the Trade Policy Review Body on the basis of two reports: a report supplied by the Member under review, in which the Member describes the trade policies and practices it pursues and a report drawn up by the WTO Secretariat.¹⁴ These reports, together with the minutes of the meeting of the Trade Policy Review Body are

¹¹ Ministerial Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, paras. 45, 47 and 49.

¹² See below, Sections 4 and 5 of this Chapter.

¹³ WTO Agreement, Annex 3, Trade Policy Review Mechanism.

¹⁴ The two reports cover all aspects of the Member’s trade policies, including its domestic laws and regulations, the institutional framework, bilateral, regional and other preferential agreements, the wider economic needs and the external environment.

published after the review and are a valuable source of information on a WTO Member's trade policy and practices.

It is important to note that the TPRM is not intended to serve as a basis for the enforcement of specific obligations under the WTO agreements or for dispute settlement procedures, or to impose new policy commitments on Members. However, by *publicly* denouncing the inconsistency with WTO law of a Member's trade policy or practices, the TPRM intends to "shame" Members into compliance *and* to bolster domestic opposition against trade policy and practices inconsistent with WTO law. Likewise, by *publicly* praising free trade policies, the TPRM bolsters, both internationally and domestically, support for such policies.

In his concluding remarks at the meeting in January 2002 at which the TPRB concluded the trade policy review of Pakistan, the Chairperson of the TPRB observed:

Purely as an aside, and as much a comment on the review process as on this Review, I was struck by [Pakistan's] Secretary Beg's remarks that questions had given his delegation food for considerable thought and that sources of information had been found of which he was unaware. This goes to the heart of our work: not only do we learn a lot about the Member, but also often the Member learns a lot about itself. Moreover, this is put into a multilateral setting, thus serving to strengthen our system. Increasingly our work highlights the value of the Trade Policy Review Body.¹⁵

1.4.5 Cooperation with other Organizations

A fifth and final function of the WTO is to cooperate with international organisations and non-governmental organizations.

Article III:5 WTO

Article III:5 of the *WTO Agreement* refers specifically to cooperation with the IMF and the World Bank. Such cooperation is mandated by the need for greater coherence in global economic policy making. The WTO has concluded agreements with both the IMF and the World Bank to give form to this cooperation.¹⁶

Article V WTO

Pursuant to Article V of the *WTO Agreement*, which is entitled "Relations with Other Organizations", the WTO is also to cooperate with other international organizations and may cooperate with non-governmental organizations ("NGO's"). The WTO has concluded cooperation arrangements with, *inter alia*, the International Labour Organization, the World Intellectual Property Organization and UNCTAD. The WTO and UNCTAD jointly operate and finance the International Trade Centre (the ITC), which works with

¹⁵ PRESS/TPRB/187, dated 25 January 2002.

¹⁶ Agreement between the International Monetary Fund and the World Trade Organization, contained in Annex I of WT/GC/W/43 and the Agreement between the International Bank for Reconstruction and Development and the World Trade Organization, contained in Annex II of WT/GC/W/43.

developing countries and economies in transition to set up effective trade promotion programmes, with a focus on the private sector.

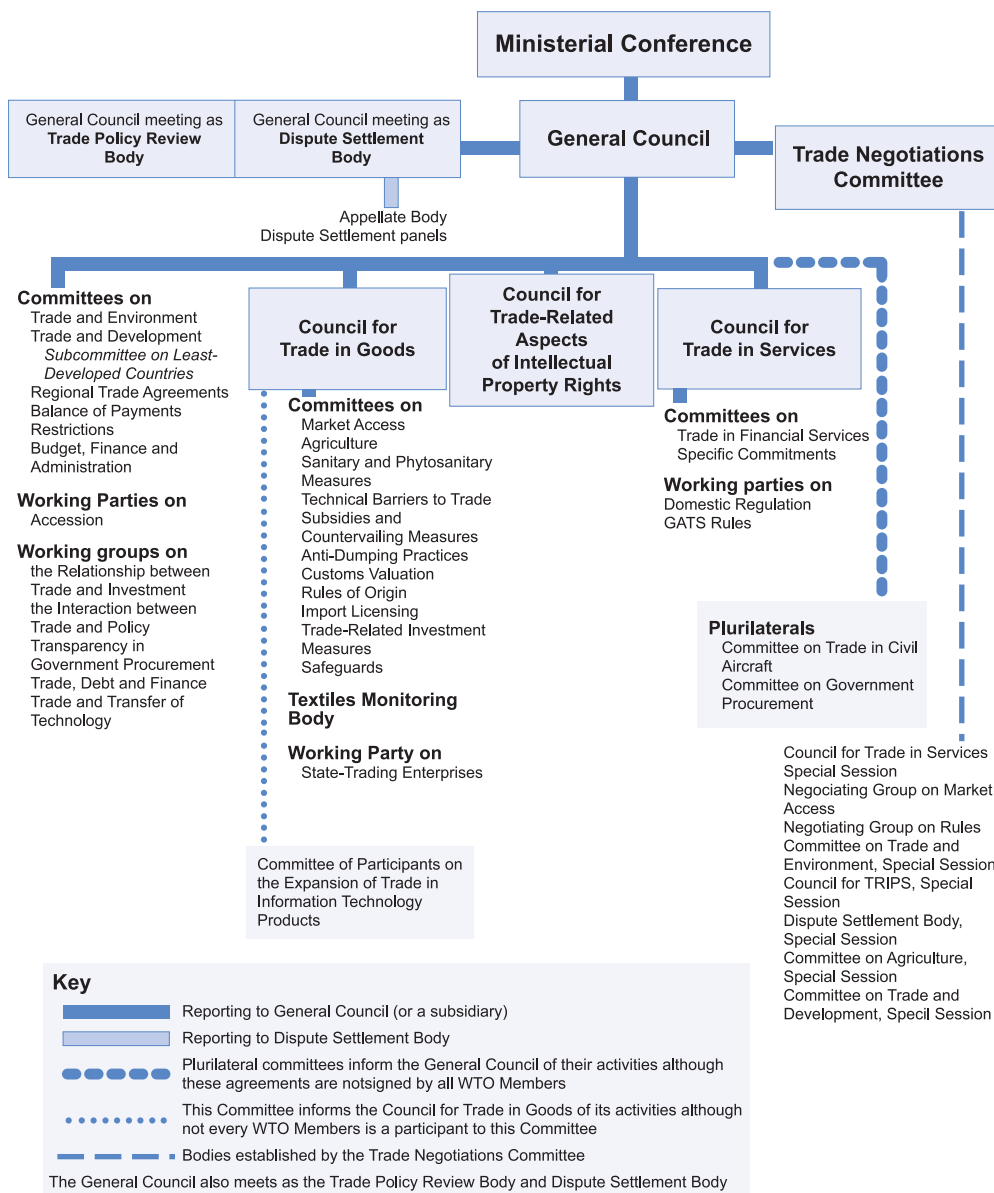
The WTO Secretariat also keeps close links with numerous NGO's concerned with trade matters. On 18 July 1996 the General Council adopted a set of guidelines clarifying the framework for relations with NGOs.¹⁷ In these guidelines the General Council "recognizes the role NGOs can play to increase the awareness of the public in respect of WTO activities." It is important for the WTO to maintain an informal and positive dialogue with the various components of civil society. To date, "cooperation" with NGOs has essentially focused on attendance by NGOs of Ministerial Conferences, symposia for NGOs on specific issues, regular briefings for NGOs on the work of the WTO and the day-to-day contact between the WTO Secretariat and NGOs. The WTO Secretariat also forwards regularly to WTO Members a list of documents, position papers and newsletters submitted by NGOs. This list is also made available on a special section of the WTO Website, devoted to NGOs and WTO activities organized for the benefit of NGOs.

1.5 Institutional Structure of the WTO

To carry out the functions and tasks entrusted to the WTO, the *WTO Agreement* provides for a manifold of bodies. The basic institutional structure of the WTO is set out in Article IV of the *WTO Agreement*. Subordinate committees and working groups have been added to this structure by later decisions.

¹⁷ **Guidelines for arrangements on relations with Non-Governmental Organizations**, Decision adopted by the General Council on 18 July 1996, WT/L/162, 23 July 1996.

WTO Organization Chart¹⁸



This chart in fact only shows the “tip of the iceberg”. There is at present a total of 70 WTO bodies of which 34 are standing bodies open to all Members.¹⁹ Many of these WTO bodies meet on a regular basis and this makes for a very heavy workload for WTO diplomats. In 2001, WTO bodies held nearly 1,000 formal and informal meetings.²⁰ For many developing country Members, with

¹⁸ This chart can be found at www.wto.org.

¹⁹ Statement by Mr. Miguel Rodriguez Mendoza, WTO Deputy Director-General, to the General Council on 13 February 2002, at www.wto.org. The ad hoc bodies (i.e., the non-standing bodies), which are also open to all Members, include the TNC, the two TNC negotiating groups and the 28 accession working parties. There are currently five plurilateral bodies which are only open to the parties to the relevant plurilateral agreement.

²⁰ Statement by Mr. Miguel Rodriguez Mendoza, WTO Deputy Director-General, to the General Council on 13 February 2002, at www.wto.org. In 2001, there were nearly 400 formal meetings, 500 informal meetings and some 90 other meetings such as symposia, workshops and seminars organized under the auspices of WTO bodies. The number of meetings is calculated on the basis of half-day units.

no or a very small permanent delegation in Geneva, the intensity of the work of the WTO is a serious problem.

The institutional structure of the WTO includes, at the highest level, the Ministerial Conference, at a second level, the General Council, the DSB and TPRB, and, at lower levels, specialised Councils, Committees and working groups. Furthermore, this structure includes quasi-judicial and other non-political bodies as well as the WTO Secretariat.

1.5.1 Ministerial Conference

Article IV:1 WTO

The Ministerial Conference is the supreme WTO body. The Ministerial Conference is composed of minister-level representatives of all Members. The Ministerial Conference has decision-making powers on all matters under any of the *multilateral* WTO agreements. The Ministerial Conference is, however, not often in session. Since 1995, there have been four sessions of the Ministerial Conference, each lasting only a few days: Singapore (1996), Geneva (1998), Seattle (1999) and Doha (2001). Since the Ministerial Conference is required to meet at least once every two years, the next session of the Ministerial Conference will take place before the end of 2003.

The sessions of the Ministerial Conference are major media events and thus focus the minds of the political leaders of the WTO Members on the current challenges to, and the future of, the multilateral trading system. The “Ministerials” offer a much-needed bi-annual opportunity to give political leadership and guidance to the WTO and its actions.

1.5.2 General Council

Article IV:2 WTO

The General Council is composed of ambassador-level diplomats and normally meets once every two months. All WTO Members are represented in the General Council. As all other WTO bodies, except the Ministerial Conference, the General Council normally meets at the WTO headquarters in Geneva.

The General Council is responsible for the continuing, day-to-day management of the WTO and its many activities. In between sessions of the Ministerial Conference, the General Council exercises the full powers of the Ministerial Conference. In addition to the powers of the Ministerial Conference, the General Council also carries out a few functions specifically assigned to it. The General Council is responsible for the adoption of the annual budget and the financial regulations.²¹

The functions assigned to the General Council also concern dispute settlement and trade policy review. As Articles IV:3 and 4 of the *WTO Agreement* state, the General Council convenes as appropriate to discharge the responsibilities of the Dispute Settlement Body (the “DSB”) and the Trade Policy Review

²¹ Article VII:1-3 of the *WTO Agreement*.

Body (the “TPRB”) respectively. The General Council, the DSB, and the TPRB are in fact the same body although they each have their own chairperson and rules of procedure. The DSB and the TPRB are the *alter ego* of the General Council. The DSB has a regular meeting once a month but may have additional meetings in between. The TPRB normally also meets (at least) once a month.

1.5.3 Specialized Councils, Committees and Working Groups

Article IV:5 WTO

At the level below the General Council, the DSB and the TPRB, there are three, so-called specialized Councils: the Council for Trade in Goods; the Council for Trade in Services; and the Council for TRIPS. All WTO Members are represented in these specialized Councils although many Members, in particular developing country Members, may find it difficult to attend all of the meetings. Under the general direction of the General Council, these specialized Councils oversee the functioning of the multilateral agreements in Annex 1A, 1B or 1C respectively. They assist the General Council and the Ministerial Conference in carrying out their functions. They carry out the tasks that the General Council or provisions of the relevant agreements have entrusted to them. The *WTO Agreement* itself explicitly stipulates, for example, that the Ministerial Conference and the General Council can only exercise their authority to adopt authoritative interpretations of the multilateral trade agreements of Annex 1 on the basis of a recommendation of the specialized Council overseeing the functioning of the agreement at issue.²² The specialized Councils also play an important role in the procedure for the adoption of waivers and the amendment procedure.²³

Article IV:6 WTO

Apart from three specialized Councils, there is a number of committees and working groups to assist the Ministerial Conference and the General Council in carrying out their functions. The *WTO Agreement* itself provides for three such committees: the Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions and the Committee on Budget, Finance and Administration. The Committee on Trade and Development (the “CTD”) is the body in which any WTO Member can bring up any matter relating to international trade and development. Its core functions are to review continuously the participation of developing countries in the multilateral trading system and take initiatives to expand the trade opportunities of developing countries. The CTD also reviews the application of the special and differential treatment provisions for developing country Members provided in the WTO agreements. The Sub-Committee on Least-Developed Countries assists the CTD on trade and development issues relating to those countries.

In 1995 the General Council established the Committee on Trade and Environment (the “CTE”). In November 2001, the Doha Ministerial Conference established a Trade Negotiations Committee (the “TNC”) to supervise the overall conduct of the new trade negotiations mandated in the Doha Ministerial

²² *Article IX:2 of the WTO Agreement.*

²³ *Article IX:3(b) and Article X:1 of the WTO Agreement.*

Declaration.²⁴ Most of the actual negotiations are conducted in two newly established negotiating groups, one on market access and one on rules, and six already existing standing WTO bodies that meet in special session.

A number of the Multilateral Agreements on Trade in Goods also provide for a committee to carry out certain functions relating to the implementation of the particular agreement. By way of example, we mention here the SPS Committee. Article 12.1 of the *SPS Agreement* states *inter alia*:

A Committee on Sanitary and Phytosanitary Measures is hereby established to provide a regular forum for consultations. It shall carry out the functions necessary to implement the provisions of this Agreement and the furtherance of its objectives, in particular with respect to harmonization. The Committee shall reach its decisions by consensus.

1.5.4 Quasi-judicial and Other Non-political Bodies

All the above WTO bodies are political in nature. The WTO also has a number of quasi-judicial and other non-political bodies. Most prominent among these bodies are the *ad hoc* dispute settlement panels and the standing Appellate Body, which are discussed in detail below.²⁵ However, the WTO also has other bodies that are, if not quasi-judicial in nature, definitely non-political. The best example of such a body is the Textile Monitoring Body (the “TMB”).²⁶ The TMB is composed of nationals of Members who sit not as representatives of their country but in their personal capacities.

1.5.5 WTO Secretariat

Article VI: 1 WTO

The WTO has a Secretariat based in Geneva, Switzerland, with a staff of some 550 officials.²⁷ This makes it undoubtedly one of the smallest Secretariats of the main international organizations. A Director-General, who is appointed by the Ministerial Conference, heads the Secretariat.²⁸ The Ministerial Conference also adopts regulations setting out the powers, duties, conditions of service and term of office of the Director-General. The current Director-General, Dr. Supachai Panitchpakdi, of Thailand, took office on 1 September 2002.

²⁴ *Para. 46 of the Doha Ministerial Declaration.*

²⁵ *See below, Section 4.6*

²⁶ *Article 8:1 of the Agreement on Textiles and Clothing.*

²⁷ *This number does not include the staff of the Secretariat of the Appellate Body, which is independent from the WTO Secretariat (see below). The 2001 WTO budget provided in total for 552 posts for the WTO and Appellate Body Secretariats; however, almost 40 posts were vacant or under recruitment. Vacancies are the subject of open competition. The final selection of professional staff is always done on the basis of a written exam and an interview. The recruitment process is highly competitive. Vacancies are advertised by means of vacancy notices, the distribution of which is made to all of the official representatives of the governments participating in the WTO. They are also posted on the WTO website (www.wto.org) and occasionally advertised in the press.*

²⁸ *Article VI:2 of the WTO Agreement.*

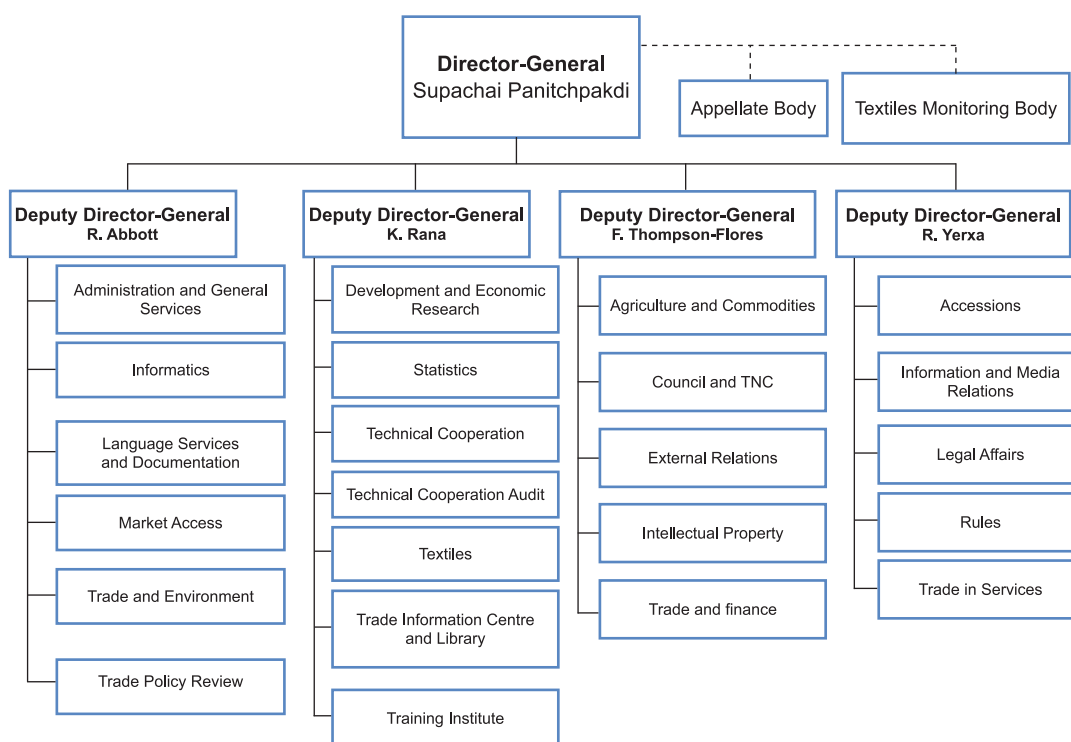
Article VI: 4 WTO

The Director-General and WTO staff are independent and impartial international officials, who shall not seek or accept instructions from any government or any other authority external to the WTO. The Members of the WTO are under an obligation to respect the international character of the responsibilities of the Director-General and of the WTO staff and must not seek to influence them in the discharge of their duties.

As WTO Members often point out, the WTO is “a Member-driven” organization. The Members, and not the Director-General or the WTO Secretariat, take decisions. Neither the Director-General nor the WTO Secretariat has any decision-making powers. The Director-General and the WTO Secretariat act primarily as an “honest broker” in, or a “facilitator” of, the decision-making processes in the WTO. They will seldom be the initiator of proposals for action or reform. In that seemingly modest role, the Director-General and the WTO Secretariat can, however, make an important contribution to helping the Members to come to an agreement or decision. The main duties of the WTO Secretariat are to provide technical and professional support for the various WTO bodies, to provide technical assistance for developing country Members, to monitor and analyse developments in world trade, to advise governments of countries wishing to become Members of the WTO, and to provide information to the public and the media. The Secretariat also provides administrative support and legal assistance in the dispute settlement process.

The WTO Secretariat is organized into divisions with a functional role (e.g., the Agriculture and Commodities Division, the Services Division and the Market Access Division), divisions with an information and liaison role (e.g., the Information and Media Relations Division) and divisions with a support role (e.g. the Administration and General Services Division and the Language Services and Documentation Division). Divisions are normally headed by a Director who reports to one of the WTO’s four Deputy Directors-General or directly to the Director-General.

WTO Secretariat Organization Chart on 1 October 2002²⁹



1.6 Membership and Accession

1.6.1 Membership

States & customs territories

On 1 September 2002, the WTO had 144 Members. The current list of Members can be found on the WTO website (www.wto.org). The WTO Membership includes not only States. Also separate customs territories pos-essing full autonomy in the conduct of their external commercial relations and in the other matters covered by the *WTO Agreement* can be WTO Members. Two examples of such WTO Members that are not States but separate customs territories, are **Hong Kong, China**, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. Also the European Communities is a WTO Member but this is a case apart, specifically provided for in the *WTO Agreement*. Both the European Communities and the 15 Member States of the European Union are Members of the WTO.

Developing countries

A large majority of the 144 Members of the WTO are developing countries. There is no WTO definition of a “developing country”. The status of “developing country Member” is based to a large extent on self-selection. Members announce for themselves whether they are “developed” or “developing” countries. Developing country Members benefit from special and differential treatment under many of the WTO agreements and receive

²⁹ This chart can be found at www.wto.org.

WTO technical assistance.³⁰ Other members can, and occasionally do, challenge the decision of a Member to make use of special and differential treatment provisions available to developing countries.

In recent years, developing country Members have played an increasingly important role in the WTO. This increased importance was very clear at the Doha Session of the Ministerial Conference in November 2001 and is reflected in the WTO Work Programme adopted in Doha.

Least-developed countries

Among the developing country Members there were on 1 September 2002, 30 least-developed countries. The WTO recognizes as least-developed countries, those countries that have been designated as such by the United Nations.³¹ Least-developed countries benefit from additional special and differential treatment.³²

1.6.2 Accession Procedure

Article XI WTO

The *WTO Agreement* initially provided for two ways of becoming a WTO Member. The first, “original membership”, was provided for in Article XI of the *WTO Agreement*, and allowed Contracting Parties to the GATT 1947 (and the European Communities) to join the WTO by accepting the terms of the *WTO Agreement* and the Multilateral Trade Agreements and making concessions and commitments for both trade in goods and services (embodied in national schedules, annexed to the GATT 1994 and the GATS respectively). This way of becoming a WTO Member was only available until March 1997.

Article XII WTO

The second way of becoming a WTO Member is through accession and this way is open indefinitely. To become a WTO Member through accession, a country or customs territory has to negotiate the terms of membership with those countries and customs territories that are already Members. The candidate for membership always has to accept the terms of the *WTO Agreement* and all Multilateral Trade Agreements. This is not up for negotiation. The subjects of the accession negotiations are the market access commitments and concessions the candidate for membership has to make. A “ticket of admission” is negotiated. When a State or customs territory accedes to the WTO, it instantly benefits from all the efforts that WTO Members have undertaken to date to reduce barriers to trade and increase market access. In return for the access to the markets of current Members that a new Member will obtain, the new Member will itself have to open up its market to the current Members. The extent of the market access commitments and concessions that a candidate for

³⁰ See below, section 3.2 and section 5.

³¹ Currently the United Nations designate 49 countries as least-developed countries. The least-developed countries among the WTO Members are Angola, Bangladesh, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Democratic Republic of the, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Senegal, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia. Seven additional least-developed countries are in the process of accession to the WTO. They are: Cambodia, Cape Verde, Laos, Nepal, Samoa, Sudan and Vanuatu. Furthermore, Bhutan, Ethiopia and Yemen are WTO Observers.

³² See below, Section 3.2 and Section 5.

membership will be expected to make will depend on its economic development, financial and trade needs and its administrative and institutional capability. Even when no major problems are encountered, accession negotiations are usually long. The shortest accession process to date took just under three years. The accession negotiations with Algeria have now been going on since 1987. The slowness of the accession negotiations has drawn considerable criticism.

In 2002, there were 28 countries negotiating their accession. The most important ongoing accession negotiations, in both economic and political terms, are those with Russia and Saudi Arabia. The most difficult and most important accession negotiations ever conducted were those with China. The accession negotiations with China took almost 15 years and resulted in a legal text of some 900 pages. On 11 December 2001, China formally became a Member of the WTO. In order to join the WTO, China has agreed to undertake a series of important market access commitments and concessions and to offer a more predictable environment for trade and foreign investment in accordance with WTO rules.

1.7 Decision-Making by the WTO

With respect to decision-making by WTO bodies, there is a distinction between the normal decision-making procedure, which applies as the default procedure, and a number of special procedures for specific decisions.

1.7.1 Normal Procedure

Article IX:1 WTO

The normal decision-making procedure for WTO bodies is set out in Article IX: 1 of the *WTO Agreement*, which states:

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. [...] Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

A WTO body is deemed to have decided by consensus on a matter submitted for its consideration, if no Member present at the meeting when the decision is taken, *formally* objects to the proposed decision.³³ In other words, unless a Member *explicitly* objects to the proposed decision, that decision is taken.

³³ Footnote 1 to Article IX of the *WTO Agreement*.

If consensus cannot be achieved, Article IX:1 of the *WTO Agreement* provides for voting on a one-country/one-vote basis.³⁴ Under the normal procedure, decisions are then taken by a majority of the votes cast. As under the old GATT, however, it is very exceptional for WTO bodies to vote.

1.7.2 Special Procedures

The *WTO Agreement* sets out a number of decision-making procedures that deviate from the normal procedure discussed above. For example, all decisions taken by the DSB are taken by consensus; resort to voting is not possible.³⁵ Decisions of the Ministerial Conference or the General Council to adopt an interpretation of provisions of the *WTO Agreement* or the multilateral trade agreements are taken by a three-fourths majority of the Members.³⁶ Decisions to waive an obligation imposed on a Member are taken by the same majority if Members do not reach a consensus within an agreed maximum time period of 90 days.³⁷ Decisions on accession are taken by a two-thirds majority of the Members.³⁸ Decisions on amendments require in most cases also a two-thirds majority of the Members, if Members do not succeed in reaching a consensus within a time period, which will normally be 90 days.³⁹ Finally, decisions on the budget and on financial regulations require a two-thirds majority of the votes comprising more than half of the Members.⁴⁰

1.8 Budget of the WTO

Article VII WTO

The total WTO budget for 2002 amounts to SF 143 m.⁴¹ In comparison with the annual budget of other international organizations, the WTO's annual budget is small and reflects the small size of the Secretariat and the relatively limited scope of the WTO's activities outside Geneva.

The contributions of Members to the WTO budget are established according to a formula based on their share of international trade in goods, services and intellectual property rights for the last three years for which data is available. There is a minimum contribution of 0.015 per cent for Members whose share in the total trade of all Members is less than 0.015 per cent. The Member States of the European Union are by far the largest contributors to the WTO budget.

³⁴ *Whereas each WTO Member has one vote, Article IX:1 of the WTO Agreement provides that when the European Communities exercises its right to vote, it shall have a number of votes equal to the number of the EU Members States which are Members of the WTO.*

³⁵ *Article 2.4 of the DSU.*

³⁶ *Article IX:2 of the WTO Agreement.*

³⁷ *Article IX:3 of the WTO Agreement.*

³⁸ *Article XII:2 of the WTO Agreement.*

³⁹ *Article X of the WTO Agreement.*

⁴⁰ *Article VII:3 of the WTO Agreement.*

⁴¹ *The 2002 Budget represents an increase of almost seven per cent over the 2001 budget to allow the WTO Secretariat to give more technical assistance to developing countries and contribute more to capacity building in these countries as mandated at the Doha Session of the Ministerial Conference.*

1.9 Test Your Understanding

- 1. What are the historical origins of the WTO and to which extent are these origins still relevant today?**
- 2. How many different agreements make up the *WTO Agreement*? Which agreement prevails in case of conflict? What is the difference between the multilateral and the plurilateral trade agreements annexed to the *WTO Agreement*?**
- 3. What are the WTO's policy objectives according to the Preamble of the *WTO Agreement* and what are the two main instruments to achieve these objectives?**
- 4. Which are the five key functions of the WTO? To which of these functions does the Doha Development Round relate? What is the objective of the trade policy review mechanism? Does the WTO involve in any way NGOs in its activities?**
- 5. What are the main bodies of the WTO? Are all Members represented in these bodies? Does the frequency of meetings raise particular problems for developing country Members?**
- 6. Is membership of the WTO limited to States? Is accession to the WTO comparable to accession to the United Nations? How does a State become a member of the WTO?**
- 7. How do WTO bodies normally take decisions? When does a WTO body resort to voting? Do the United States, the European Communities, India, Costa Rica and Burkina Faso have the same number of votes?**

2. BASIC RULES OF WTO LAW AND POLICY

Objectives

On completion of this section, the reader will be able to identify the basic rules of WTO law and policy that are the foundation of what is commonly referred to as the *multilateral trading system*.

2.1 Non-Discrimination

There are two principles of non-discrimination in WTO law: the most-favoured-nation (MFN) treatment obligation and the national treatment obligation.⁴²

MFN Treatment

The MFN treatment obligation requires a WTO Member that grants certain favourable treatment to another country, to grant that same favourable treatment to all other WTO Members. A WTO Member is not allowed to discriminate between its trading partners by giving some countries more favourable treatment than others in terms of, for example, market access or the application of domestic regulation. The MFN treatment obligation is the single most important rule in WTO law. Without this rule the multilateral trading system would and could not exist. It applies both to trade in goods (Article I of the GATT 1994) and to trade in services (Article II of the GATS).⁴³

National Treatment

The national treatment obligation requires a WTO Member to treat “like” foreign and domestic products, services or service suppliers equally. Where the national treatment obligation applies, foreign products, services or service suppliers may, once they have entered the domestic market, not be subject to less favourable taxation or regulation than “like”⁴⁴ domestic products, services or service suppliers. Pursuant to the national treatment obligation, a WTO Member is not allowed to discriminate between its own products, services or service suppliers *and* foreign products, services or service suppliers. For trade in goods, the national treatment obligation has *general* application (Article III:2 and III:4 of the GATT 1994). For trade in services, the national treatment obligation applies to the extent WTO Members have explicitly committed themselves in respect of specific services to treat foreign and domestic services and service suppliers equally (Article XVII of the GATS). Such commitments are made in a Member’s Schedule of Specific Commitments.⁴⁵

2.2 Market Access

WTO law contains three main groups of rules regarding market access: rules concerning customs duties, i.e., tariffs; rules concerning quantitative restrictions, such as quotas; and rules concerning (other) non-tariff barriers,

⁴² See also Modules 3.5, 3.6 and 3.8 of this Course.

⁴³ Also the TRIPS Agreement provides in Article 4 for a MFN treatment obligation.

⁴⁴ With respect to taxation, the national treatment obligation also applies to “directly competitive or substitutable” foreign and domestic products.

⁴⁵ The TRIPS Agreement provides in Article 3 for a national treatment obligation.

such as technical regulations and standards, sanitary and phytosanitary measures, customs formalities and government procurement practices. Furthermore, the principles of transparency and “justiciability” are important for effective market access.⁴⁶

Customs Duties

Under WTO law the imposition of customs duties on trade in goods is not prohibited but WTO law calls upon countries to negotiate the mutually beneficial reduction of customs duties. These negotiations result in tariff concessions or bindings, which are listed in a Member’s Schedule of Concessions. For those products for which such a tariff binding exists, the customs duties applied may no longer exceed the level at which they were bound (Article II:1 GATT 1994).⁴⁷

Quantitative Restrictions

While customs duties are in principle not prohibited (but may not exceed the level at which they are bound), quantitative restrictions (“QRs”) on trade in goods are, as a general rule, forbidden. Unless one of many exceptions applies, WTO Members are not allowed to ban the importation or exportation of goods or to subject them to quotas (Article XI:1 GATT 1994) With regard to trade in services, a Member who has undertaken market-access commitments with respect to a specific sector may generally speaking not maintain or adopt quantitative restrictions in that sector, unless otherwise specified in its Schedule (Article XVI:2 GATS).

Non-Tariff Barriers

Non-tariff barriers to trade (“NTBs”), such as technical regulations and standards, sanitary and phytosanitary measures, customs formalities and government procurement practices are today for many products and many countries more important barriers to trade than customs duties or quantitative restrictions. Rules on these and other non-tariff barriers are set out in a number of GATT provisions (e.g., Article VIII GATT 1994) and specific WTO agreements, such as the *Agreement on Sanitary and Phytosanitary Measures* (the “*SPS Agreement*”) and the *Agreement on Technical Barriers to Trade* (the “*TBT Agreement*”). The latter agreements not only prohibit measures that discriminate between “like” foreign and domestic products. The *TBT Agreement*, for example, also requires in respect of technical regulations that these regulations are *not more trade-restrictive than necessary* to fulfil one of the legitimate policy objectives mentioned in the Agreement (e.g., the protection of human health and safety).⁴⁸ The *SPS Agreement* requires *inter alia* that sanitary and phytosanitary measures are based on scientific principles and are not maintained without sufficient scientific evidence (except when the measures are only provisional in nature).⁴⁹

Transparency & justiciability

The obligation on Members to publish all trade laws, regulations and judicial decisions in such a manner as to allow governments and traders to become acquainted with them (the principle of transparency) is important to ensure

⁴⁶ See also Modules 3.5, 3.6 and 3.8 of this Course.

⁴⁷ Customs duties are not imposed on trade in services and the GATS therefore does not provide for rules on customs duties.

⁴⁸ See also Module 3.9 of this Course.

⁴⁹ See also Module 3.7 of this Course.

effective access to foreign markets.⁵⁰ Likewise, the obligation on Members to maintain or institute judicial, arbitral or administrative tribunals for the purpose, *inter alia*, of the prompt, objective and impartial review of administrative decisions affecting trade in goods or services is essential to guarantee security and predictability in international trade (the principle of “justiciability”).⁵¹ Generally, Members must ensure that all measures of general application affecting trade in goods and services are administered in a reasonable, objective and impartial manner.⁵²

2.3 Protection Against Unfair Trade

WTO law does not have general rules on unfair trade practices, but it does have some highly technical and complex rules that relate to specific forms of “unfair” trade. These rules concern dumping and subsidies.

Dumping

Dumping, i.e., to bring a product onto the market of another country at a price less than the normal value of that product, is condemned but not prohibited in WTO law. However, when the dumping causes or threatens to cause material injury to the domestic industry of a country, WTO law allows that country to impose anti-dumping duties on the dumped products in order to offset the dumping. The relevant rules are set out in Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.⁵³

Subsidies

Subsidies, i.e., a financial contribution by a government or public body that confers a benefit, are subject to a complex set of rules. Some subsidies, such as export subsidies and subsidies contingent upon the use of domestic over imported products are, as a rule, prohibited. Other subsidies are not prohibited but when they cause adverse effects to the interests of other countries, the subsidizing country should withdraw the subsidy or take appropriate steps to remove the adverse effects. If the subsidizing country fails to do so, countermeasures commensurate with the degree and nature of the adverse effect may be authorized.⁵⁴

If a prohibited or other subsidy causes or threatens to cause material injury to the domestic industry of a country producing a “like” product, that country is authorized to impose countervailing duties on the subsidized products to offset the subsidization.

The rules applicable to subsidies and countervailing duties are set out in Articles VI and XVI of the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures* (the “SCM Agreement”).⁵⁵ Subsidies relating to

⁵⁰ See, e.g., Article X:1 of the GATT 1994 and Article III:1 of the GATS.

⁵¹ See, e.g., Article X:3(b) of the GATT 1994 and Article VI:2(a) of the GATS.

⁵² See, e.g., Article X:3(a) of the GATT 1994 and Article VI:1 of the GATS.

⁵³ See also Module 3.11 of this Course.

⁵⁴ Until 1 January 2000, there was a third category of so-called “non-actionable subsidies” regulated in Articles 8 and 9 of the SCM Agreement. However, the WTO Members failed to agree on the extension of the application of these provisions and these provisions therefore lapsed (see Article 31 of the SCM Agreement).

⁵⁵ See also Module 3.12 of this Course.

agricultural products are subject to different (more lenient) rules set out in the *Agreement on Agriculture*.

2.4 Trade and Competing Interests and Values

Apart from the above basic rules and principles, WTO law also provides for a number of general exceptions to these basic rules and disciplines to allow countries in certain circumstances to take account of economic and/or non-economic interests and values that compete with free trade.⁵⁶

2.4.1 *Competing Non-Economic Interests and Values*

The non-economic interests and values include the protection of the environment, public health, public morals and national security. Pursuant to Article XX of the GATT 1994 or Article XIV of the GATS, Members may take measures that are “necessary”, for example, to protect public health, provided the application of these measures does not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Article XXI of the GATT 1994 and Article XIV *bis* of the GATS allow Members to take measures to protect national security interests. It also allows the taking of measures to give effect to UN mandated trade embargoes or sanctions.

2.4.2 *Competing Economic Interests and Values*

Economic interests that may compete with trade include the protection of a domestic industry from serious injury inflicted by an unexpected and sharp surge in imports. Article XIX of the GATT 1994 and the *Agreement on Safeguards* allow Members to take safeguard measures (in the form of the imposition of customs duties above the binding or the imposition of quotas) giving temporary protection to the domestic industry.⁵⁷ Other economic interests that may compete with trade are the safeguarding of the balance of payments⁵⁸ and the pursuit of regional economic integration.⁵⁹ These exceptions may be invoked by all countries and will allow these countries, if they meet certain specific conditions, to deviate from the basic rules and disciplines.

2.5 Test Your Understanding

1. Which basic rules of WTO law and policy constitute the foundation of the multilateral trading system?
2. What do the MFN treatment obligation and the national treatment obligation have in common? In what do they differ?

⁵⁶ See also Module 3.5, 3.6, 3.8 and 3.13 of this Course.

⁵⁷ For safeguard measures relating to trade in services, see Article X of the GATS.

⁵⁸ See Article XII of the GATT 1994 and Article XII of the GATS.

⁵⁹ See Article XXIV of the GATT 1994 and Article V of the GATS.

- 3. How do the basic WTO rules on customs duties and quantitative restrictions differ? Do WTO rules on non-tariff barriers only prohibit discrimination between domestic and foreign products?**
- 4. Do WTO rules prohibit dumping or subsidization of imported products? Do WTO rules allow Members to take action against dumped or subsidized imports?**
- 5. Generally speaking, in which circumstances may WTO law justify deviation from the basic rules of non-discrimination and market access? Does free trade prevail over the protection of public health under WTO law?**

3. DEVELOPING COUNTRIES IN THE WTO SYSTEM

Objectives

This section shows how and to which extent WTO law and policy take account of the special interests and needs of developing country Members and least-developed country Members and assist them in their efforts to integrate into the multilateral trading system. It also covers the special and differential treatment that is currently already bestowed on developing and least-developed country Members.

3.1 Recognition of the Interests and Needs of Developing Countries

Preamble WTO

In the Preamble of the *WTO Agreement*, WTO Members explicitly recognize the need for positive efforts designed to ensure that developing countries, and especially the least developed countries, are integrated into the multilateral trading system and secure a share in the growth in international trade commensurate with the needs of their economic development.⁶⁰ As noted above, a large majority of the WTO Members are developing countries and 30 of them are least-developed countries. In the Doha Ministerial Declaration adopted at the close of the Fourth Session of the Ministerial Conference in Doha in November 2001, the WTO Members noted:

Doha Ministerial Declaration

International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainable financed technical assistance and capacity-building programmes have important roles to play.

We recognize the particular vulnerability of the least-developed countries and the special structural difficulties they face in the global economy. We are committed to addressing the marginalization of least-developed countries in international trade and to improving their effective participation in the multilateral trading system. We recall the commitments made by ministers at our meetings in Marrakesh, Singapore and Geneva, and by the international community at the Third UN Conference on Least-Developed Countries in Brussels, to help least-developed countries secure beneficial and meaningful integration into the multilateral trading system and the global economy. We are determined that the WTO will play its part in building effectively on these commitments under the Work Programme we are establishing.⁶¹

⁶⁰ *WTO Agreement, Preamble, second paragraph.*

⁶¹ *Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/1, paras. 2 and 3.*

The interests and needs of developing countries, and, in particular, least-developed countries are, since the 2001 Doha Session of the Ministerial Conference, more than ever before at the heart of the WTO's activities and concerns. At the Doha Session itself, the WTO Members adopted a *Decision on Implementation Related Issues and Concerns*, addressing problems developing country Members have experienced with the implementation of the WTO agreements resulting from the Uruguay Round.⁶² WTO Members also adopted in Doha a *Declaration on the TRIPS Agreement and Public Health*, in which they affirmed, against the background of the gravity of the public health problems afflicting many developing and least-developed countries, that the *TRIPS Agreement* can and should be interpreted and implemented in a manner supportive of WTO Members' right to promote access to medicines for all.⁶³ In the Doha Development Round, and the broader Work Programme for the WTO, agreed to in Doha, the interests and needs of developing countries are central. The integration of developing countries, and especially least developed countries, in the multilateral trading system and efforts to secure them a bigger share in international trade are high on the WTO's agenda.

3.2 Special and Differential Treatment for Developing Country Members

To ensure that developing countries, and especially the least developed countries, are integrated into the multilateral trading system and increase their share in international trade, WTO law already provides for many special provisions in favour of developing and least-developed countries, taking into account their particular needs and interests. In general, these provisions provide, in many areas, for fewer or less demanding obligations, longer periods for implementation and technical assistance. This section describes the special and differential treatment provided for *all* developing country Members. The following section focuses on the *additional* special and differential treatment provided for the least-developed countries.

In the Doha Decision on Implementation Issues of 14 November 2001, Members agreed as follows:

The Committee on Trade and Development is instructed:

(i) to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council

⁶² Decision of the Ministerial Conference on Implementation-related Issues and Concerns, 14 November 2001, WT/MIN(01)/DEC/17.

⁶³ Declaration of the Ministerial Conference on the TRIPS Agreement and Public Health, 14 November 2001, WT/MIN(01)/DEC/2.

with clear recommendations for a decision by July 2002;

(ii) to examine additional ways in which special and differential treatment provisions can be made more effective, to consider ways, including improved information flows, in which developing countries, in particular the least-developed countries, may be assisted to make best use of special and differential treatment provisions, and to report to the General Council with clear recommendations for a decision by July 2002; and

(iii) to consider, in the context of the work programme adopted at the Fourth Session of the Ministerial Conference, how special and differential treatment may be incorporated into the architecture of WTO rules.⁶⁴

In this section, we distinguish between provisions aimed at increasing trade opportunities; provisions allowing flexibility for developing countries in the use of measures in support of their economic development; provisions allowing longer periods for implementation; provisions limiting the possibility to take action against products originating in developing country Members; and provisions concerning technical assistance.

3.2.1 *Increasing Trade Opportunities*

Part IV GATT 1994

Pursuant to Article XXXVII:1 of Part IV of the GATT 1994, entitled *Trade and Development*,⁶⁵ WTO Members must “to the fullest extent possible” give high priority to the reduction and elimination of barriers to trade in products currently or potentially of particular export interest to developing country Members and refrain from imposing higher tariff or non-tariff barriers to trade with developing country Members. Furthermore, Article XXXVI:8 of Part IV of the GATT 1994 incorporates into WTO law the principle of non-reciprocity in trade negotiations between developed and developing country Members. This provision states:

The developed country Members do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing country Members.

Enabling Clause

The 1979 *Decision on Differential and More Favourable Treatment*, commonly referred to as the Enabling Clause, further elaborates the provisions of Part IV of the GATT 1994.⁶⁶ The Enabling Clause allows developed country Members to depart from the MFN treatment obligation in their trade relations with developing countries and to grant these countries “differential and more favourable treatment. The Enabling Clause states in relevant part:

Notwithstanding the provisions of Article I of the General Agreement, Members may accord differential and more favourable treatment to developing countries, without according such treatment to other Members.

⁶⁴ Para. 12.1 of the Decision, WT/MIN(01)/EC/17.

⁶⁵ Part IV was not part of the original GATT 1947 but was added in 1965.

⁶⁶ BISD 26S/203.

Developed country Members are thus allowed to grant preferential tariff treatment to developing country Members. Most developed country Members have done so under the Generalized System of Preferences (the “GSP”), first adopted as a policy by UNCTAD in 1968. A high percentage of the exports of developing countries is covered by GSP schemes and thus benefits from preferential tariff treatment. The Enabling Clause also provides for differential and more favourable treatment with respect to non-tariff measures and allows developing country Members to enter into regional or global arrangements amongst themselves for the mutual reduction or elimination of tariffs and, under certain conditions, non-tariff barriers to trade.

Article IV GATS

Article IV of the GATS, which is entitled “Increasing Participation of Developing Countries”, calls for the negotiation of specific commitments to facilitate the increasing participation of developing country Members in world trade in services. Article IV refers *inter alia* to specific commitments relating to access to technology on a commercial basis; access to distribution channels and information networks; and, more generally, the liberalization of market access for services of export interest to developing country Members. Under Article IV:2, developed country Members must establish contact points to facilitate the access of service suppliers of developing country Members to information relating to the supply of services in their respective markets.

3.2.2 Measures in Support of Economic Development

Article XVIII GATT 1994

Article XVIII of the GATT 1994, entitled “Government Assistance to Economic Development”, recognizes that it may be necessary for developing country Members “to take protective or other measures affecting imports” in order to implement their programmes and policies of economic development. More specifically, Sections A, C and D of Article XVIII, the “infant industry” sections, allow, under certain conditions, developing country Members to modify or withdraw tariff concessions or to take other GATT inconsistent measures in order to promote the establishment of a particular industry. Furthermore, Section B of Article XVIII, the “balance of payments” section, allows, again under certain conditions, developing country Members to impose quantitative restrictions on imports in order to safeguard their external financial position and to ensure a level of reserves adequate for the implementation of their programmes and policies of economic development.⁶⁷

Subsidies

The *SCM Agreement* recognizes that subsidies may play an important role in economic development programmes of developing country Members. This agreement thus provides that the general prohibition on export subsidies does not apply to developing country Members that have a *per capita* income below \$ 1000 per annum.⁶⁸

Safeguard Measures

The *Safeguards Agreement* allows developing country Members to extend the period of application of a safeguard measure for a period of up to two

⁶⁷ See also the Uruguay Round Understanding on the Balance-of-Payments Provisions of GATT 1994.

⁶⁸ Article 27.2 and Annex VII of the *SCM Agreement*.

years beyond the normal maximum period of eight years. Developing country Members may also apply a safeguard measure *again* to the import of a product that has been subject to such a measure, earlier than developed country Members are allowed.⁶⁹

Agriculture

The *Agreement on Agriculture* imposes on developing country Members less demanding requirements regarding the reduction of, for example, agricultural export subsidies and tariffs on agricultural imports. Developing country Members are required to reduce the budgetary outlays for export subsidies and the quantities benefiting from such subsidies by 24 and 14 per cent respectively. Developed countries must reduce by 36 and 21 per cent respectively. The required average reduction of tariffs of developing country Members was 24 per cent, while developed country Members had to reduce their tariff by 36 per cent.

GATS

Article XII:1 of the GATS recognizes that particular pressures on the balance of payments of a Member in the process of economic development “may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development”. As under Article XVIII of the GATT 1994, the use of restrictions for balance of payments purposes is, therefore, allowed subject to specific conditions.

Article XIX:2 of the GATS provides that the process of liberalization of trade in services must take place with due respect for national policy objectives and the level of development of individual Members. For developing country Members there must be “appropriate flexibility” for opening *fewer* sectors, liberalizing *fewer* types of transactions, *progressively* extending market access in line with their development situation, and attaching to such market access *conditions* aimed at achieving the objectives of increasing their participation in world trade in services.

3.2.3 Longer Periods for Implementation

Additional Time

Many WTO agreements provide that developing country Members have longer periods to implement the obligations under those agreements. The *TRIPS Agreement*, for example, granted developing country Members a delay of application of the TRIPS provisions until 1 January 2000; developed country Members had to apply the TRIPS provisions as of 1 January 1996. Under the *Agreement on Agriculture*, developing country Members have ten years, instead of the “normal” six years, to implement their reduction commitments.⁷⁰

The Decision of 14 November 2001 of the Ministerial Conference at the Doha Session on Implementation Issues includes a number of provisions to make “additional time” provisions in the WTO agreements more specific.

⁶⁹ Article 9.2 of the *Safeguards Agreement*.

⁷⁰ Article 15.2 of the *Agreement on Agriculture*.

3.2.4 Limitations on action Against Products Originating in Developing Country Members

Anti-Dumping Measures

Several WTO agreements that allow action against fair and unfair trade of Members, such as the *Anti-Dumping Agreement*, the *SCM Agreement* and the *Safeguards Agreement*, limit the possibility to take action against developing country Members. *The Anti-Dumping Agreement* requires developed country Members considering the application of anti-dumping measures to give “special regard” to “the special situation of developing countries”.⁷¹ Before applying anti-dumping duties affecting the essential interests of developing country Members, developed country Members must first explore the possibilities of constructive remedies provided for by the *Anti-Dumping Agreement*.⁷² Under the *Safeguards Agreement* safeguard measures shall normally not be applied against a product originating in a developing country Member as long as that Member’s share of imports of the product concerned in the importing Member does not exceed three per cent.⁷³ The *SCM Agreement* requires developed country Members to terminate any countervailing duty investigation of a product originating in a developing country as soon as it has been determined that the overall level of subsidies granted upon the product concerned does not exceed two per cent of its value; or the volume of the subsidized imports represents less than four per cent of the total imports of the like product in the importing Member.⁷⁴

Safeguard Measures

Countervailing Duties

3.2.5 Technical Assistance

Many WTO agreements, including the *SPS Agreement*, the *TBT Agreement*, the *TRIPS Agreement*, the *Customs Valuation Agreement* and the *DSU*, specifically provide for technical assistance to developing country Members. This technical assistance may be given, on a bilateral basis, by developed country Members, or may be given by the WTO Secretariat.

At the Doha Session of the Ministerial Conference in November 2001, developing country Members made their participation in a new round of trade liberalisation negotiations “conditional” upon a significant increase in technical assistance and capacity building efforts in order to enable them to participate effectively in the new Round and to allow them to benefit fully from the results. The WTO has therefore embarked on a programme of greatly enhanced support for developing countries. Thus far, this has resulted in a notable increase in the WTO’s budget and generous donations from developed country Members to the Doha Development Agenda Global Trust Fund. Since 1998, available

⁷¹ Article 15, first sentence, of the *Anti-Dumping Agreement*. See also paras. 7.1 to 7.4 of the Doha Decision on Implementation Issues, WT/MIN(01)/DEC/17.

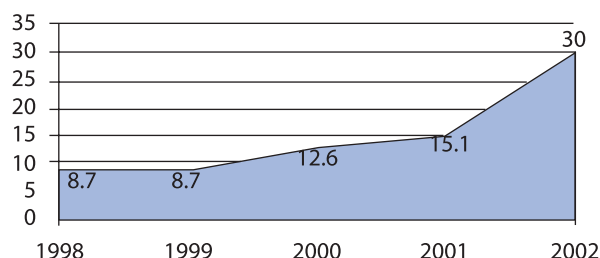
⁷² Article 15, second sentence, of the *Anti-Dumping Agreement*.

⁷³ Article 9.1 of the *Safeguards Agreement*. However, if the imports of all developing country Members with less than three per cent import share collectively account for more than nine per cent of the total imports of the product concerned, safeguard measures may be applied.

⁷⁴ Article 27.10 of the *SCM Agreement*. However, if imports from developing country Members whose individual share of total imports represents less than four per cent collectively account for more than nine per cent of the total imports of the like product in the importing Member than the countervailing duty investigation must not be terminated.

funds for technical assistance have risen by 340 per cent to a projected CHF 30 million in 2002.

Funding for technical cooperation activities in CHF million ⁷⁵



The WTO has also significantly improved coordination with other international organizations (World Bank, IMF, UNCTAD, etc.) in the so-called Integrated Framework, with regional banks and regional organizations and with bilateral governmental donors. The WTO considers that “[a]ssisting officials from developing countries in their efforts to better understand WTO rules and procedures — and how these rules and procedures can benefit developing countries — is among the most important aspects of the organization’s work.”⁷⁶

The WTO Secretariat, and, in particular, the Technical Cooperation Division, organizes, mostly in response to a specific request from one or more developing country Members, *general seminars* on the multilateral trading system and the work of the WTO; *technical seminars and workshops* focussing on a particular area of trade law or policy; and *technical missions* to assist developing country Members on specific tasks related to the implementation of obligations under the WTO agreements (such as the adoption of trade legislation or notifications). In 2002 the WTO Secretariat organized 514 technical cooperation activities as compared with 349 in 2001.⁷⁷

Furthermore, the WTO Secretariat, and in particular, the WTO Training Institute, which was established in 2001, also organizes training courses. These training courses, held at WTO headquarters in Geneva, run for as long as 12 weeks and cover the full range of WTO issues. In 2002, 300 government officials of developing country Members will receive in this way an intensive training in WTO law and policy.⁷⁸ The WTO also organizes a programme known as Geneva Week, which is a special week-long event bringing together representatives of WTO member countries who do not have permanent missions in Geneva. Geneva Week covers all WTO activities and includes presentations by other international organizations based in Geneva. In 2002 Geneva Week will be organized twice.

⁷⁵ 2002 figure projected. See WTO Secretariat, *Factsheet on Technical Cooperation*, 28 March 2002, at www.wto.org

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ In 2001 the number of government officials participating in these training seminars was only 116. *Ibid.*

Since 1997, the WTO Secretariat has also been installing Reference Centres in developing countries.⁷⁹ These Reference Centres allow government officials to access essential documents instantly via the WTO website. As of March 2002, 109 reference centres had been established in 88 countries including 54 in Africa, 16 in the Caribbean, 17 in Asia, 10 in the Middle East, 10 in the Pacific, three in Latin America, and two in Eastern Europe.⁸⁰

Shaded Areas Are Those Serviced By WTO Reference Centres.



3.3 Special and Differential Treatment for Least-Developed Country Members

For least-developed country Members, WTO law provides *additional* special and differential treatment.

3.3.1 *Increased Trade Opportunities*

With regard to trade in goods, the Enabling Clause provides that developed country Members must exercise the utmost restraint in seeking any concessions or contributions in trade negotiations from the least-developed country Members. At the First Session of the Ministerial Conference in 1996 in Singapore, developed country Members agreed to examine how they could improve access to their markets for products originating in least-developed country Members, including the possibility of removing tariffs completely.

With regard to trade in services, the GATS provide that developed country Members must take account of the serious difficulty of the least-developed countries in accepting specific commitments.

⁷⁹ The WTO Secretariat provides governments with computer and other hardware, software and the training required for the operation of these Reference Centres.

⁸⁰ See WTO Secretariat, *Factsheet on Technical Cooperation*, 28 March 2002, at www.wto.org

3.3.2 Measures in Support of Economic Development

The prohibition on export subsidies under the *SCM Agreement* does not apply to least-developed country Members.⁸¹ Moreover, the *Agreement on Agriculture* exempts the least-developed country Members from the obligation to reduce tariffs on agricultural imports and agricultural domestic and export subsidies.⁸²

3.3.3 Longer Periods for Implementation

In view of the special needs and requirements of least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, least-developed country Members may delay the application of most obligations under the *TRIPS Agreement* for a period of 11 years, i.e., until 1 January 2006.⁸³ Pursuant to the *SCM Agreement*, the prohibition on subsidies contingent on the use of domestic over imported goods shall not apply to least-developed countries for a period of eight years, i.e., until 1 January 2003.⁸⁴

3.4 Test Your Understanding

- 1. Does WTO law and policy recognize the particular interests and needs of developing country Members? If so, has there been a positive or negative evolution in the extent of this recognition?**
- 2. What special and differential treatment for developing country Members does WTO law provide with respect to access to the markets of developed country Members?**
- 3. Does WTO law give developing country Members significantly more leeway than developed country Members to apply trade-restrictive or trade-distorting measures adopted in support of domestic economic development?**
- 4. Which of the provisions of WTO law providing developing country Members with extra time to implement their obligations are still relevant in 2003?**
- 5. Are developed country Members restrained from applying anti dumping, countervailing or safeguard measures against imports of products originating from developing country Members? If so, to what extent?**
- 6. In which respect do least-developed countries receive additional special and differential treatment under WTO law?**

⁸¹ Article 27.2 of the *SCM Agreement*.

⁸² Article 15.2 of the *Agreement on Agriculture*.

⁸³ Article 66.1 of the *TRIPS Agreement*. However, the *MFN treatment obligation* and the *national treatment obligation* do apply.

⁸⁴ Article 27.3 of the *SCM Agreement*.

4. GENERAL FEATURES OF THE WTO DISPUTE SETTLEMENT SYSTEM

Objectives

On completion of this section, the reader will be able to identify and assess the general features of the dispute settlement system of the WTO.

4.1 Past and Present

The WTO dispute settlement system, as it has been operating since 1 January 1995, did not fall out of the blue. It is not a novel system. On the contrary, this system is based on, and has absorbed, almost fifty years of experience with the resolution of trade disputes in the context of the GATT 1947.⁸⁵ Article 3.1 of the DSU states:

Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.

4.1.1 GATT Dispute Settlement (1948-1995)

GATT 1947

As explained above, the GATT 1947 was not conceived as an international organization for trade.⁸⁶ The GATT 1947 therefore did not provide for an elaborate dispute settlement system. In fact, the GATT 1947 contained only two brief provisions relating to dispute settlement: Articles XXII and XXIII.

Under the GATT 1947, a dispute, which parties failed to resolve through consultations, was in the early years of the GATT “handled” by working parties set up pursuant to Article XXIII:2. These working parties consisted of representatives of all interested Contracting Parties, including the parties to the dispute, and made decisions on the basis of consensus. From the 1950s however, a dispute was usually first heard by a so-called “panel” of three to five independent experts from GATT Contracting Parties not involved in the dispute. This panel then reported to the GATT Council, consisting of all Contracting Parties, which would have to adopt by consensus the recommendations and rulings of the panel before they would become legally binding on the parties to the dispute. The dispute settlement procedures and practices, which were developed over the years in a pragmatic *ad hoc* manner, were progressively codified and supplemented by decisions and understandings on dispute settlement adopted by the Contracting Parties. In 1983, a GATT Legal Office was established within the GATT Secretariat, to help panels, often composed of trade diplomats without legal training, with the drafting of panel reports. As a result, the legal quality of panel reports improved and the

⁸⁵ See Article 3.1 of the DSU but also Article XVI:1 of the WTO Agreement.

⁸⁶ See above, Section 1.1.

confidence of the Contracting Parties in the panel system increased.⁸⁷ During the 1980s, previous panel reports were increasingly used as a sort of “precedent” and the panels started using customary rules of interpretation of public international law.

Legalization

In view of these developments in the GATT dispute settlement system since the 50s, Bob Hudec speaks of the increasing “legalisation” of the GATT’s “diplomat’s jurisprudence”. The GATT dispute settlement system evolved from a power-based system of dispute settlement through diplomatic negotiations into a system that had many features of a rules-based system of dispute settlement through adjudication.

Success & Failure

While the GATT dispute settlement has generally been considered as quite successful in fully or partially resolving disputes to the satisfaction of the complaining party, the system had some serious shortcomings, which became ever more acute in the 1980s and the early 1990s. The most important shortcoming of the system was that the decision on the establishment of a panel, the decision on the adoption of the panel report and the decision to authorize the suspension of concessions, were to be taken by the GATT Council by consensus. The responding party could thus delay or block any of these decisions and thus paralyse or frustrate the operation of the dispute settlement system. In particular, the adoption of panel reports became a real problem from the late 1980s onwards. The fact that the losing party could prevent the adoption of the panel report meant that panels were often tempted to arrive at a conclusion that would be acceptable to all parties. Whether that conclusion was legally sound and convincing was not a prime concern. Furthermore, the Contracting Parties regarded the dispute settlement process as unable to handle many of the politically sensitive trade disputes since the assumption was that the respondent would refuse to agree to the establishment of a panel or the losing party would prevent the adoption of the panel report. As a result, some Contracting Parties, and, in particular, the United States, resorted increasingly to unilateral action against measures they considered in breach of GATT law.

4.1.2 The WTO Dispute Settlement Understanding

Uruguay Round

The improvement of the GATT dispute settlement system was high on the agenda of the Uruguay Round negotiations. The 1986 Punta del Este Ministerial Declaration on the Uruguay Round stated with regard to dispute settlement:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.

⁸⁷ Hudec, R. e.a., “A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989”, *Minnesota Journal of Global Trade*, 1993, 138.

Already in 1989, the negotiators were able to reach agreement on a number of improvements to the GATT dispute settlement system. These improvements included the recognition of the right to a panel and strict timeframes for panel proceedings. No agreement was reached, however, on the most difficult issue of the adoption of panel reports by consensus. This issue was only resolved in the final stages of the Round and was linked to the introduction of appellate review of panel reports.

DSU

The *Understanding on Rules and Procedures Governing the Settlement of Disputes*, commonly referred to as the *Dispute Settlement Understanding* or DSU, is attached to the *WTO Agreement* as Annex 2 and constitutes an integral part of that Agreement. The DSU provides for an elaborate dispute settlement system and is often referred to as one of the most important achievements of the Uruguay Round negotiations. The most significant innovations to the GATT dispute settlement system concern: (1) the quasi-automatic adoption of requests for the establishment of a panel, of dispute settlement reports and of requests for the authorization to suspend concessions; (2) the strict timeframes for various stages of the dispute settlement process; and (3) the possibility of appellate review of panel reports. The latter innovation is closely linked to the quasi-automatic adoption of panel reports and reflects the concern of Members to ensure high-quality panel reports.

4.1.3 WTO Dispute Settlement to Date

Use made of the System

The WTO dispute settlement system has been operational for almost eight years now and in that period it has arguably been the most prolific of all international dispute settlement systems. Since 1 January 1995, a total of 268 disputes have been brought to the WTO system for resolution.⁸⁸ In more than one fifth of the disputes brought to the WTO system, the parties were able to reach a mutually agreed solution through consultations or the dispute was resolved otherwise without recourse to adjudication. In other disputes, parties have resorted to adjudication and, to date, such adjudication procedures have been completed in some 80 disputes.⁸⁹ There are currently 19 disputes pending before panels⁹⁰ and, very exceptionally, none before the Appellate Body.⁹¹ With different degrees of intensity, pre-adjudication consultations between parties to a dispute are currently being held in 209 disputes at the time of writing.⁹²

⁸⁸ Number 269 being *EC – Customs Classification of Frozen Boneless Chicken Cuts*, complaint by Brazil (WT/DS269) (filed 11 October 2002).

⁸⁹ For data on WTO dispute settlement cases, see www.wto.org and www.worldtradelaw.net.

⁹⁰ See www.wto.org, “Update of WTO Dispute Settlement Cases”, WT/DS/OV/6, dated 3 May 2001, p. 40-53. One of these disputes is a dispute currently before a panel pursuant to Article 21.5 of the DSU.

⁹¹ See www.wto.org, “Update of WTO Dispute Settlement Cases”, WT/DS/OV/6, dated 3 May 2002, p. 54.

⁹² See www.wto.org, “Update of WTO Dispute Settlement Cases”, WT/DS/OV/6, dated 3 May 2002, p. 1- 40.

4.2 Object and Purpose of the WTO Dispute Settlement System

Article 3.2 DSU

Article 3.2 of the DSU states:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

Article 3.7 DSU

Article 3.7 of the DSU states in relevant part:

The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.

Article 3.3 DSU

WTO Members have explicitly recognized that the prompt settlement of disputes arising under the covered agreements “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”⁹³ The declared object and purpose of the WTO dispute settlement system is to achieve “a satisfactory settlement” of disputes in accordance with the rights and obligations established by the covered agreements.⁹⁴ Furthermore, the object and purpose of the dispute settlement system is for Members to seek redress for a violation of obligations or other nullification or impairment of benefits through the *multilateral* procedures of the DSU, rather than through *unilateral* action.⁹⁵ Article 23.1 of the DSU states:

Article 3.4 DSU

Article 23 DSU

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

It should be recalled that concerns regarding unilateral actions by the United States against what it considered to be violations of GATT law, were one of the driving forces behind the negotiations of the DSU.

⁹³ Article 3.3 of the DSU.

⁹⁴ Article 3.4 of the DSU.

⁹⁵ See Article 23 of the DSU.

Article 3.7 DSU

The DSU expresses a clear preference for solutions mutually acceptable to the parties reached through negotiations, rather than solutions resulting from adjudication. Article 3.7, quoted above, states in relevant part that a solution mutually acceptable to the parties to a dispute is “clearly to be preferred”.

Accordingly, each dispute settlement proceeding must start with consultations between the parties to the dispute with a view to reaching a mutually agreed solution. To resolve disputes through consultations is obviously cheaper and more satisfactory for the long-term trade relations with the other party to the dispute than adjudication by a panel.

4.3 Jurisdiction

4.3.1 Scope of Jurisdiction

Article 1.1 DSU

The WTO dispute settlement system has jurisdiction over any dispute between WTO Members arising under what are called the covered agreements. The covered agreements are the WTO agreements listed in Appendix 1 to the DSU, including the *WTO Agreement*, the GATT 1994 and all other Multilateral Agreements on Trade in Goods, the GATS, the *TRIPS Agreement* and the DSU.⁹⁶ Article 1.1 of the DSU establishes “an integrated dispute settlement system” which applies to all of the covered agreements.⁹⁷ The DSU provides for a single, coherent system of rules and procedures for dispute settlement applicable to disputes arising under any of the covered agreements.

Article 1.2 DSU

However, some of the covered agreements provide for a few special and additional rules and procedures “designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement”.⁹⁸ Pursuant to Article 1.2 of the DSU, these special or additional rules and procedures prevail over the DSU rules and procedures to the extent that there is a “difference”, i.e., a conflict, between the DSU rules and procedures and the special and additional rules and procedures.⁹⁹

4.3.2 Compulsory Jurisdiction

Article 23.1 DSU

The jurisdiction of the WTO dispute settlement system is compulsory in nature. Pursuant to Article 23.1 of the DSU, quoted above, a complaining Member is obliged to bring any dispute arising under the covered agreements to the WTO dispute settlement system.

⁹⁶ *Plurilateral Trade Agreements are covered agreements subject to the adoption of a decision by the parties to these agreements setting out the terms for the application of the DSU (Appendix 1 of the DSU). Of the two plurilateral agreements currently in force, only the Agreement on Government Procurement is a covered agreement.*

⁹⁷ *Appellate Body Report, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico (“Guatemala – Cement I”), WT/DS60/AB/R, adopted 25 November 1998, para. 64.*

⁹⁸ *Ibid.*, para. 66.

⁹⁹ *As the Appellate Body ruled in Guatemala – Cement I, para. 65, “it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special additional provisions are to prevail”.*

Article 6.1 DSU

As a matter of law a responding Member, on the other hand, has no choice but to accept the jurisdiction of the WTO dispute settlement system. With regard to the latter, we note that Article 6.1 of the DSU states:

If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

Unlike in other international dispute settlement systems, there is no need for the parties to a dispute arising under the covered agreements to accept in a separate declaration or separate agreement the jurisdiction of the WTO dispute settlement system to adjudicate that dispute. Accession to the WTO constitutes consent to and acceptance of the compulsory jurisdiction of the WTO dispute settlement system.

With regard the jurisdiction of the WTO dispute settlement system, it should also be noted that the system has only contentious, and no advisory, jurisdiction.

4.4 Access to WTO Dispute Settlement

Access to, that is, the use of, the WTO dispute settlement system is limited to Members of the WTO. The Appellate Body ruled in *US – Shrimp*:

It may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the WTO Agreement and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members “having a substantial interest in a matter before a panel” may become third parties in the proceedings before that panel.¹⁰⁰ Thus, under the DSU, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by, a panel.¹⁰¹

The WTO dispute settlement system is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members.

4.4.1 Causes of Action

Causes of Action

Each covered agreement contains one or more consultation and dispute settlement provisions. These provisions set out when a Member can have

¹⁰⁰ [Footnote in the quote] See Articles 4, 6, 9 and 10 of the DSU.

¹⁰¹ Appellate Body Report, *US – Shrimp*, para 101.

recourse to the WTO dispute settlement system. For the GATT 1994, the relevant provisions are Articles XXII and XXIII. Of particular importance is Article XXIII:1 of the GATT 1994, which states:

If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) the failure of another Member to carry out its obligations under this Agreement, or*
- (b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or*
- (c) the existence of any other situation, the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other Member or Members which it considers to be concerned.*

In *India – Quantitative Restrictions*, the Appellate Body held:

This dispute was brought pursuant to, inter alia, Article XXIII of the GATT 1994. According to Article XXIII, any Member which considers that a benefit accruing to it directly or indirectly under the GATT 1994 is being nullified or impaired as a result of the failure of another Member to carry out its obligations, may resort to the dispute settlement procedures of Article XXIII. The United States considers that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under Article XVIII:B of the GATT 1994. Therefore, the United States was entitled to have recourse to the dispute settlement procedures of Article XXIII with regard to this dispute.¹⁰²

The consultation and dispute settlement provisions of most other covered agreements incorporate by reference Articles XXII and XXIII of the GATT 1994. For example, Article 11.1 of the *SPS Agreement*, entitled “Consultations and Dispute Settlement”, states:

The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein.

Nullification or Impairment

As was the case in *India – Quantitative Restrictions*, the nullification or impairment of a benefit or the impeding of the realization of an objective may, and most often will, be the result of a violation of an obligation prescribed by a covered agreement. Nullification or impairment or the impeding of the

¹⁰² Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (“*India – Quantitative Restrictions*”), WT/DS90/AB/R, adopted 22 September 1999, para. 84.

attainment of objectives may however, also be the result of “the application by another Member of any measure, whether or not it conflicts with the provisions” of a covered agreement.¹⁰³ Nullification or impairment or the impeding of the attainment of objectives may equally be the result of “the existence of any other situation.”¹⁰⁴

Types of Complaints

Unlike other international dispute settlement systems, the WTO system thus provides for three types of complaints: “violation” complaints, “non-violation” complaints and “situation” complaints.¹⁰⁵ In the case of a “non-violation” complaint or a “situation” complaint, the complainant must demonstrate that there is nullification or impairment of a benefit or the achievement of an objective is impeded.¹⁰⁶ With regard to a “violation” complaint, however, Article 3.8 of the DSU states:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

Violation complaints are by far the most common type of complaints. To date, there have, in fact, been few non-violation complaints¹⁰⁷ and no situation complaints. The difference between the WTO system and other international dispute settlement systems on this point may therefore, be “of little practical significance”.¹⁰⁸

Broad Discretion

There is no explicit provision in the DSU requiring a Member to have a “legal interest” in order to have recourse to the WTO dispute settlement system. It has been held that such a requirement is not implied either in the DSU or any other provision of the WTO Agreement.¹⁰⁹ In *EC – Bananas III*, the Appellate Body held:

... we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the DSU suggests, furthermore,



¹⁰³ Article XXIII:1 (b) of the GATT 1994 and Article 26.1 of the DSU

¹⁰⁴ Article XXIII:1 (c) of the GATT 1994 and Article 26.2 of the DSU.

¹⁰⁵ Pursuant to Article XXIII.3 of the GATS, situation complaints are not possible in disputes arising under the GATS. Pursuant to Article 64.2 of the TRIPS Agreement non-violation complaints and situation complaints were not possible in disputes arising under the TRIPS Agreement during a period of five years from the date of entry into force of the WTO Agreement. Article 64.3 provides that the Ministerial Conference can only extend this period by consensus. No such decision has been taken and, therefore, both types of complaint are now possible.

¹⁰⁶ Article 26 of the DSU.

¹⁰⁷ See, e.g., *Japan – Film and Korea – Government Procurement*.

¹⁰⁸ Feliciano, F. and Van den Bossche, P., “The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice”, in Blokker, M. and Schermers, H. (eds.), *Proliferation of International Organizations* (Kluwer Law International, 2001), p. 308.

¹⁰⁹ Appellate Body Report, *EC – Bananas III*, paras. 132 and 133.

*that a Member is expected to be largely self-regulating in deciding whether any such action would be “fruitful”.*¹¹⁰

The Appellate Body explicitly agreed with the statement of the Panel in *EC – Bananas III* that:

*... with the increased interdependence of the global economy, ... Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly.*¹¹¹

In *EC – Bananas III*, the Appellate Body considered in deciding whether the United States could bring a claim under the GATT 1994, the fact that the United States is a producer and a potential exporter of bananas, the effects of the EC banana regime on the United States internal market for bananas and the fact that the United States claims under the GATS and the GATT 1994 were inextricable interwoven. The Appellate Body subsequently concluded that “[t]aken together, these reasons are sufficient justification for the United States to have brought its claims against the EC banana import regime under the GATT 1994.”¹¹² The Appellate Body added, however, that “this does not mean though, that one or more of the factors we have noted in this case would necessarily be dispositive in another case.”¹¹³

4.4.2 Involvement of Non-State Actors

Amicus curiae

As noted above, the WTO dispute settlement system is a government-to-government dispute settlement system for disputes concerning rights and obligations of WTO Members. Individuals, companies, international organizations or non-governmental organizations, including environmental and human rights NGOs, labour unions and industry associations, have no access to the WTO dispute settlement system. They cannot bring claims of violation of WTO rights or obligations. Under the current rules, they do not have the *right* to be heard or the right to participate, in any way, in the proceedings. However, under Appellate Body case law, panels and the Appellate Body have the right to accept and consider written briefs submitted by individuals, companies or organisations. The acceptance by panels and the Appellate Body of these briefs, which are commonly referred to as *amicus curiae* briefs (“friend of the court” briefs), has been controversial and criticised by most WTO Members. A detailed discussion of this issue is included in Module 3.2 The Panel Process and 3.3 The Appellate Review Process.¹¹⁴

¹¹⁰ Appellate Body Report, *EC – Bananas III*, para. 135.

¹¹¹ Appellate Body Report, *EC – Bananas III*, para. 136.

¹¹² Appellate Body Report, *EC – Bananas III*, para. 138.

¹¹³ Ibid.

¹¹⁴ See Module 3.2, p. xx, and Module 3.3, p. xx.

4.5 Dispute Settlement Methods

The WTO dispute settlement system provides for more than one dispute settlement method. The DSU allows for the settlement of disputes through consultations (Article 4 of the DSU); through good offices, conciliation and mediation (Article 5 of the DSU); through adjudication by *ad hoc* panels and the Appellate Body (Articles 6 to 20 of the DSU) or through arbitration (Article 25 of the DSU).

Consultations

As discussed above, the DSU expresses a clear preference for solutions mutually acceptable to the parties to the dispute, rather than solutions resulting from adjudication. Therefore, resort to adjudication by a panel must be preceded by consultations between the complaining and responding parties to the dispute with a view to reaching a mutually agreed solution. Section 1 of Module 3.2 examines in detail this pre-litigation, diplomatic method of dispute settlement.

Adjudication

If consultations fail to resolve the dispute, the complaining party may resort to adjudication by a panel and, if either party to the dispute appeals the findings of the panel, the Appellate Body. Modules 3.2 and 3.3 examine in detail this quasi-judicial method of dispute settlement.

Arbitration

The dispute settlement methods set out in Articles 4 to 20 of the DSU (consultations and adjudication by panels and the Appellate Body) are by far the most frequently used methods. However, the WTO dispute settlement system provides for expeditious arbitration as an alternative means of dispute settlement. Pursuant to Article 25 of the DSU, parties to a dispute arising under a covered agreement may decide to resort to arbitration, rather than follow the procedure set out in Articles 4 to 20 of the DSU. In that case, the parties must clearly define the issues referred to arbitration and agree on the particular procedure to be followed.¹¹⁵ The parties must also agree to abide by the arbitration award.¹¹⁶ Pursuant to Article 3.5 of the DSU, the arbitration award must be consistent with the covered agreements. In the latter part of 2001, WTO Members used the Article 25 arbitration procedure for the first time.¹¹⁷

Good Offices, Conciliation and Mediation

The WTO dispute settlement system also provides, pursuant Article 5 of the DSU, for the possibility for the parties to a dispute — if they all agree to do so — to use good offices, conciliation or mediation to settle a dispute. To date, no use has been made of the dispute settlement methods provided for in Article 5 but in 2001 the Director-General reminded Members of his availability to help to settle disputes through good offices.

¹¹⁵ Articles 25.1 and 25.2 of the DSU.

¹¹⁶ Article 25.3 of the DSU.

¹¹⁷ Award of the Arbitrators, United States – Section 110(5) of the US Copyright Act, recourse to arbitration under Article 25 of the DSU, WT/DS160/ARB25/1, 9 November 2001.

4.6 Institutions of WTO Dispute Settlement

DSB

Among the institutions involved in WTO dispute settlement, there is a distinction between the political institutions of the WTO and, in particular, the Dispute Settlement Body, and independent, judicial-type institutions such as *ad-hoc* dispute settlement panels and the standing Appellate Body. While the WTO has entrusted the adjudication of disputes to panels at the first instance level and the Appellate Body at the appellate level, the Dispute Settlement Body continues to play an active role in the WTO dispute settlement system. The Dispute Settlement Body, or DSB, is an *alter ego* of the General Council of the WTO.¹¹⁸ The General Council convenes as the DSB to administer the rules and procedures of the DSU.¹¹⁹ Article 2.1 of the DSU states:

... the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

Article 2.4 of the DSU stipulates that where the DSU provides for the DSB to take a decision, such a decision is always taken by consensus.¹²⁰ It is important to note, however, that for most key decisions, such as the decision on the establishment of a panel, the adoption of panel and Appellate Body reports and the authorization of suspension of concessions and other obligations, the consensus requirement is in fact a “reverse” or “negative” consensus requirement.¹²¹ The “reverse” consensus requirement means that the DSB is deemed to take a decision unless there is a consensus among WTO Members not to take the decision. Since there will usually be at least one Member with a strong interest in that the DSB takes the decision to establish a panel, to adopt the panel and/or Appellate Body reports or to authorize the suspension of concessions, it is very unlikely that there will be a consensus not to adopt these decisions. As a result, decision-making by the DSB on these matters is, for all practical purposes, automatic. Furthermore, it should be noted that the DSU provides for strict “timeframes” within which decisions on these matters need to be taken.¹²²

The DSB meets as often as necessary to carry out these functions within the time frames provided in the DSU. In practice, the DSB has one regularly scheduled meeting per month and, in addition, a number of special meetings are convened when the need for a meeting arises.

¹¹⁸ See above, Section 1.5.2.

¹¹⁹ Article IV:2 of the WTO Agreement and Article 2.1 of the DSU.

¹²⁰ Footnote 1 to the DSU states: “The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision.”

¹²¹ See Articles 6.1, 16.4, 17.14 and 22.6 of the DSU. Other decisions of the DSB, such as the appointment of the Members of the Appellate Body, are taken by “normal” consensus.

¹²² For example, the decision to adopt an Appellate Body report shall be taken within 30 days following its circulation to the Members (see Article 17.14 of the DSU). If there is no meeting of the DSB scheduled during this period, such a meeting shall be held for this purpose (see footnote 8 to the DSU).

Panels

At the request of a complaining party, the DSB will establish a panel to hear and decide a dispute. The DSB will do so by reverse consensus. The establishment of a panel is therefore “automatic”. As a rule, panels consist of three persons, who are not nationals of the Members involved in the dispute. These persons are often trade diplomats or government officials but also academics and practising lawyers regularly serve as panellists. The terms of reference of the panel are determined by the request for the establishment of a panel, which identifies the measure at issue and the provisions of the covered agreements allegedly breached. It is the task of panels to make an objective assessment of the matter, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. A detailed analysis of the process of the establishment and the composition of panels, their terms of reference, the applicable standard of review, rules of conduct for panellists, and the exercise of judicial activism and judicial economy by panels is included in Module 3.2.

Appellate Body

The Appellate Body hears appeals from the reports of dispute settlement panels. Unlike panels, the Appellate Body is a permanent, standing international tribunal. It is composed of seven persons, referred to as Members of the Appellate Body. Members of the Appellate Body are appointed by the DSB for a term of four years, once renewable. Only the complaining or responding party can initiate appellate review proceedings. Appeals are limited to issues of law covered in the panel report or legal interpretations developed by the panel. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel that were appealed. Details of all aspects of the appellate review process are given in Module 3.3.

Other Institutions

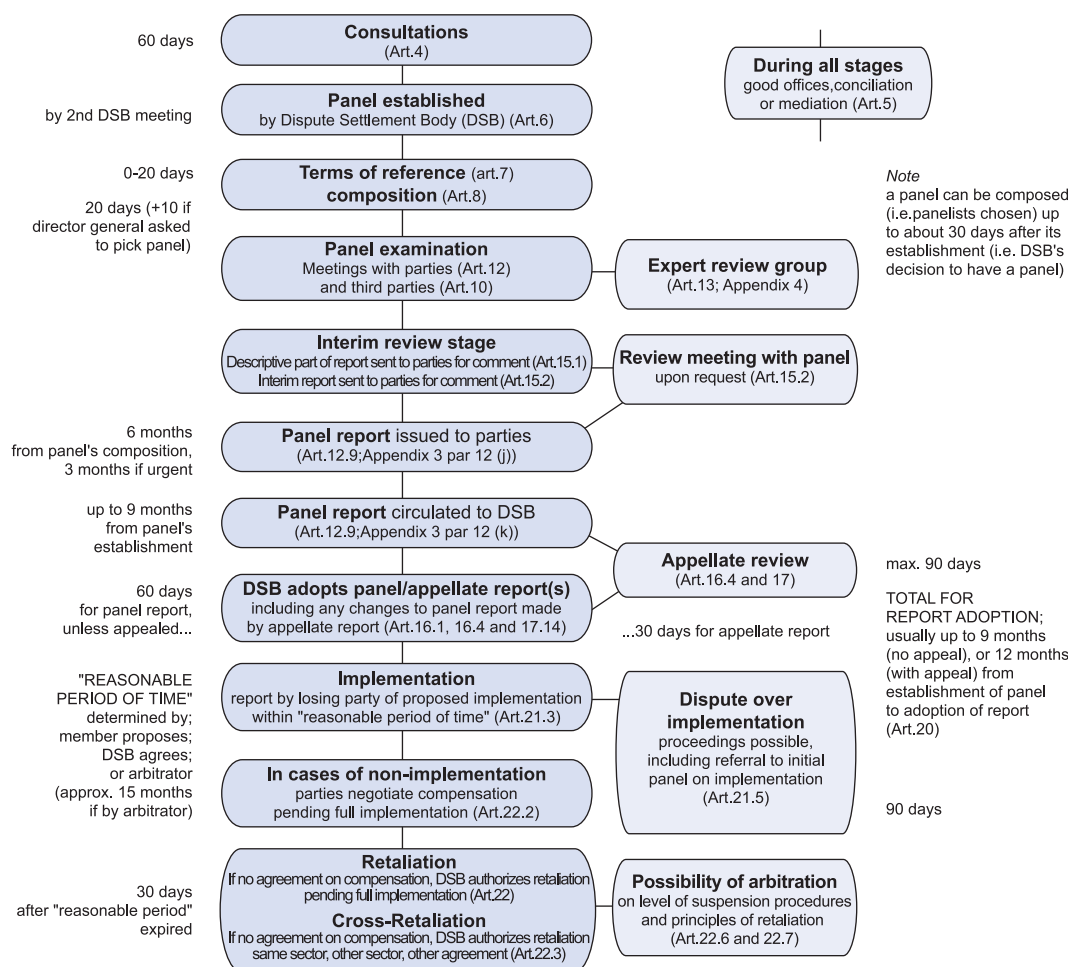
Apart from the DSB, panels and the Appellate Body, there are a number of other institutions and persons involved in the WTO’s efforts to resolve disputes between its Members. These institutions and persons include arbitrators under Articles 21.3, 22.6 or 25 of the DSU, the Textile Monitoring Body under the *ATC*, the Permanent Group of Experts under the *SCM Agreement*, Experts and Expert Review Groups under Article 13 of the DSU and Article 11.2 of the *SPS Agreement*, the Chairman of the DSB and the Director-General of the WTO.

Furthermore, the WTO Secretariat and the Secretariat of the Appellate Body play important roles in providing administrative and legal support to panels and the Appellate Body respectively.

4.7 WTO Dispute Settlement Proceedings

The flow-chart below indicates the major steps in the WTO dispute settlement proceedings.¹²³

¹²³ WTO, *Trading into the Future*, 41.



There are four stages in WTO dispute settlement proceedings: (1) consultations; (2) panel proceedings; (3) Appellate Body proceedings; and (4) implementation of the recommendations and rulings. Each of these stages is examined in detail in Modules 3.2, 3.3 and 3.4.

4.7.1 Time-frame for the Proceedings

Articles 12.8 & 12.9 DSU

One of the most striking features of the WTO dispute settlement system is the short time frames within which the proceedings of both panels and the Appellate Body must be completed.¹²⁴ The period in which a panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months.¹²⁵ When a panel considers that it cannot issue its report within six months, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it shall issue its report. In no case *should* the period from the establishment of the panel to the circulation of the report to the

¹²⁴ Note that the SCM Agreement provides for even shorter time frames in particular cases. See Module 3.12.

¹²⁵ Article 12.8 of the DSU. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months and shall make every effort to accelerate the proceedings to the greatest extent possible (Articles 12.9 and 4.9 of the DSU).

Members exceed nine months.¹²⁶ Much shorter still is the time frame within which a panel has to rule on the WTO-consistency of measures taken to comply with the recommendations and rulings under Article 21.5 of the DSU. In such proceedings, the panel must circulate its report within 90 days after the date of referral of the matter to it.

Article 17.5 DSU

With regard to the Appellate Body proceedings, the DSU provides that, as a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report.¹²⁷ When the Appellate Body believes that it cannot render its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case *shall* the proceedings exceed 90 days.

No other international court or tribunal operates under such severe time limits. These time limits, and in particular the time limits for the Appellate Body, have been criticized as excessively short and too demanding for both the parties to the dispute and the Appellate Body. As a result of these time limits, however, there is no backlog of cases either at the panel or appellate level. While panels frequently go beyond the time limits imposed on them by the DSU, the Appellate Body has thus far been able to complete all but four appeals within the maximum period of 90 days.¹²⁸

4.7.2 Confidentiality of the Proceedings

Submissions, meetings & hearings

The WTO dispute settlement proceedings are also characterized by their confidentiality. Consultations, panel proceedings and appellate review proceedings are all confidential. Meetings of the DSB and panels and the oral hearing of the Appellate Body take place behind closed doors. All written submissions to a panel or to the Appellate Body by the parties and third parties to the dispute are confidential.¹²⁹ Parties may make their *own* submissions available to the public. While a few Members do so in a systematic manner (e.g., the United States), most parties choose to keep their submissions confidential. The DSU provides that a party to a dispute must, upon request of any WTO Member, provide a non-confidential summary of the information contained in its submissions to the panel that could be disclosed to the public. However, this provision does not provide for a deadline by which such non-confidential summary must be made available and is, therefore, not very effective.

¹²⁶ Article 12.9 of the DSU.

¹²⁷ Article 17.5 of the DSU. In cases of urgency, including those which concern perishable foods, the Appellate Body shall make every effort to accelerate the proceedings to the greatest extent possible (Articles 17.5 and 4.9 of the DSU).

¹²⁸ Appellate Body Report, *EC – Hormones*; Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (“US – Lead and Bismuth II”)*, WT/DS138/AB/R, adopted 7 June 2000; Appellate Body Report, *EC – Asbestos*; and Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (“Thailand – H-Beams”)*, WT/DS122/AB/R, adopted 5 April 2001.

¹²⁹ Article 18.2, Article 17.10 and Appendix 3, para. 3 of the DSU.

Reports

The interim report of the panel and the final panel report as long as it is only issued to the parties to the dispute are also confidential. The final panel report only becomes a public document when it is circulated to all WTO Members. In reality, however, the interim report and the final report issued to the parties do not remain confidential very long and are usually “leaked” to the media. Unlike panel reports, Appellate Body reports are not first issued to the parties and then, weeks later, circulated to all WTO Members. In principle they are issued to the parties and circulated to all WTO Members at the same time and are as of that moment a public document.

4.8 Remedies for Breach of WTO Law

Article 3.7 DSU

What can or should be done if a panel and/or the Appellate Body conclude that a measure is inconsistent with WTO law? Article 3.7 of the DSU states:

In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure, which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

Article 19.1 DSU

Article 19.1 of the DSU provides:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned¹³⁰ bring the measure into conformity with that agreement.¹³¹ In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

Article 21.1 DSU

Article 21.1 of the DSU adds to this:

Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

Article 21.3 DSU

However, if it is impracticable to comply immediately with the recommendations and rulings of the DSB, the Member concerned shall have a

¹³⁰ The “Member concerned” is the party to the dispute to which the panel or Appellate Body recommendations are directed.

¹³¹ With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26.

reasonable period of time in which to do so.¹³² This reasonable period of time can either be agreed upon by the parties or be determined through binding arbitration. In those cases in which the reasonable period of time for implementation has been determined through arbitration, it has been set between six months and 15 months and one week.¹³³ With respect to compensation (for future damages) and retaliation in case of non-compliance, Article 22.1 states:

Article 22.1 DSU

Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.

The DSU does not explicitly provide for the compensation of damage suffered.¹³⁴

4.9 Test Your Understanding

- 1. To what extent is dispute settlement under the GATT 1947 relevant to WTO dispute settlement? What are the most significant changes made to the GATT dispute settlement system by the DSU?**
- 2. What is according to the DSU, the object and purpose of the WTO dispute settlement system? To which disputes does the DSU apply?**
- 3. What are the consequences of the compulsory jurisdiction of the WTO dispute settlement system for the parties to a dispute?**
- 4. Who may make use of the WTO dispute settlement system? When can they make use of the system?**
- 5. Apart from consultations and adjudication, which other methods of dispute settlement does the WTO dispute settlement system provide for?**
- 6. What is the role of the Dispute Settlement Body in resolving a dispute between Members? Give a brief overview of the various stages of WTO dispute settlement proceedings. What can or should be done if a panel and/or the Appellate Body conclude that a measure is inconsistent with WTO law?**

¹³² Article 21.3 of the DSU.

¹³³ See Module 3.4.

¹³⁴ *Ibid.*

5. DEVELOPING COUNTRY MEMBERS

Objectives

This Section examines the use made of the WTO dispute settlement system by developing country Members and describes in general terms only, the special and differential treatment granted to developing country Members in WTO dispute settlement proceedings. More details of this special and differential treatment are given in Modules 3.2, 3.3 and 3.4. The Section also describes the support developing country Members involved in WTO dispute settlement may receive from the WTO Secretariat, the Advisory Centre for WTO Law and other sources.

5.1 Use Made of the Dispute Settlement System

The WTO dispute settlement system has been used intensively by the major trading powers, and, in particular, the United States and the European Communities. Developing country Members, however, have also had frequent recourse to the WTO dispute settlement system, both to challenge trade measures of major trading powers¹³⁵ and to settle trade disputes with other developing countries.¹³⁶ During the first six years of the WTO dispute settlement system (1995-2000) in 26 per cent of all cases brought to the WTO system for resolution developing countries were complainants and in 40 per cent they were respondents.¹³⁷ In 2000 and 2001, developing countries brought more disputes to the WTO system than did developed countries. The most active users of the dispute settlement system among developing country Members are Brazil, India, Mexico, Thailand and Chile. To date, no least-developed country has ever brought a complaint to the WTO or has been a respondent in WTO dispute settlement proceedings.

5.2 Special and Differential Treatment

The DSU recognises the special situation of developing and least-developed country Members. There are a number of DSU provisions that grant special rights to developing countries in the consultation and panel processes. Special rules for developing country Members are found in Article 3.12, Article 4.10,

¹³⁵ See for example: *United States – Standards of Reformulated and Conventional Gasoline* (“US – Gasoline”), complaints by *Venezuela (DS2)* and *Brazil (DS4)*, *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (“US – Underwear”), complaint by *Costa Rica (DS24)*, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (“US – Wool Shirts and Blouses”), complaint by *India (DS33)*, and *EC – Bananas III*, complaint by *Ecuador, Guatemala, Honduras, Mexico and the United States (DS27)*. In all these disputes the complainants successfully challenged the trade measure of a major trading power.

¹³⁶ See for example: *Brazil – Measures Affecting Desiccated Coconut* (“Brazil – Coconut”), complaint by the *Philippines (DS22)*; *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, complaint by *Turkey (DS211)*; and *Turkey – Restrictions on Imports of Textile and Clothing Products*, complaint by *India (DS34)*.

¹³⁷ Park, Y.D. and Umbricht, G., “WTO Dispute Settlement 1995-2000: a Statistical Analysis”, *JIEL* 2001, 213-230, at 216.

Article 8.10, Article 12.10, Article 12.11, Article 24 and Article 27 of the DSU. For the most part, these special rules and procedures have not been much used to date. A detailed examination of these provisions is included in Modules 3.2, 3.3 and 3.4.

5.3 Legal Assistance

WTO Secretariat

The WTO Secretariat assists all Members in respect of dispute settlement when they so request. However, the DSU recognizes that there may be a need to provide additional legal advice and assistance to developing country Members.¹³⁸ To meet that additional need, Article 27.2 of the DSU requires the WTO Secretariat to make available qualified legal experts to help any developing country Member which so requests. The extent to which the Secretariat can assist developing country Members is, however, limited both by lack of manpower and by the requirement that the Secretariat's experts should give assistance in a manner "ensuring the continued impartiality of the Secretariat".¹³⁹ The experts can thus not act on behalf of a developing country Member in a dispute with another Member and their assistance is necessarily limited to the preliminary phases of a dispute.

Advisory Centre on WTO Law

Effective legal assistance to developing country Members in dispute settlement proceedings is given by the newly established, Geneva-based Advisory Centre on WTO Law.¹⁴⁰ At the occasion of the official opening of the Advisory Centre on WTO Law on 5 October 2001, Mr. Mike Moore, the then WTO Director-General, said that with the establishment of the Advisory Centre for "the first time a true legal aid centre has been established within the international legal system, with a view to combating the unequal possibilities of access to international justice as between States". The Advisory Centre is an independent intergovernmental organization (fully independent from the WTO), which will function essentially as a law office specialized in WTO law, providing legal services and training exclusively to developing country and economy-in-transition Members of the Advisory Centre and all least-developed countries. The Centre will provide support at all stages of WTO dispute settlement proceedings at discounted rates for its developing country Members and all least-developed countries. The current 32 Members (nine developed countries, 22 developing countries and one economy-in-transition) have pledged in total US\$ 9.8 million for the endowment fund and US\$6 million for the multi-year contributions.¹⁴¹ In the summer of 2001, the Advisory Centre assisted for the

¹³⁸ Article 27.2 of the DSU.

¹³⁹ Article 27.2, final sentence, of the DSU.

¹⁴⁰ In parallel with the third Ministerial Conference of the WTO in Seattle, on 1 December 1999, the Ministers of Bolivia, Canada, Colombia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, Guatemala, Honduras, Hong Kong China, Ireland, Italy, Kenya, Netherlands, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sweden, Thailand, Tunisia, United Kingdom, Uruguay, Venezuela and Zimbabwe signed the "Agreement establishing the Advisory Centre on WTO Law". Thereafter India, Latvia and Senegal made use of the temporary option to join the Advisory Centre by signing the Agreement before 31 March 2000. The conditions for the entry into force of the Agreement were met on 15 June 2001 by the deposit of the twentieth instrument by Kenya while the threshold financial contributions for an amount of US\$ 12 million had already been met earlier.

¹⁴¹ Membership of the Centre remains open to all WTO Members and those in the process of accession to WTO through an accession procedure.

first time a WTO developing country Member in a dispute settlement procedure when it assisted Pakistan in the Appellate Body proceedings in *United States – Cotton Yarn*.

5.4 Test Your Understanding

- 1. Have developing country Members made much use of the WTO dispute settlement system to date?**
- 2. Does the DSU take account of the particular situation of developing country Members?**
- 3. Do developing country Members involved in WTO dispute settlement benefit from legal assistance? By whom and under which conditions is this assistance granted?**

6. NEGOTIATIONS ON THE DISPUTE SETTLEMENT SYSTEM

Objectives

During the first seven years of its operation, the WTO dispute settlement system has in many respects been a remarkable success and has become the “centrepiece” of the WTO. The relatively frequent recourse to the WTO dispute settlement system by developing and developed country Members is commonly taken as a reflection of the confidence of all WTO Members in this system and as one measure of its utility for such Members.¹⁴² However, the system as it currently operates is of course not perfect and can be further improved.

At the time of adoption of the WTO Agreement, it was agreed that the WTO Ministerial Conference would complete a full review of the DSU within four years after the entry into force of the *WTO Agreement*, and subsequently take a decision on whether to continue, modify or terminate the DSU. In the context of this review of the DSU, which took place in 1998 and 1999, Members made a large number of proposals and suggestions for further improvement of the dispute settlement system. In the run-up to and during the Seattle Session of the Ministerial Conference in December 1999, Members made a considerable but eventually unsuccessful effort to agree on modifications to be made to the DSU. In 2000 and 2001, informal efforts outside the DSB to reach agreement on DSU amendments were continued. Also these efforts, intensified in the run-up to the Doha Session of the Ministerial Conference in November 2001, did not lead to an agreement. At the Doha Session of the Ministerial Conference, it was agreed, however, to open in January 2002 formal negotiations with the aim of concluding by May 2003 an agreement on changes to the DSU. The negotiations are based on the work done so far and on new proposals by Members. The Ministerial Declaration states that the negotiations on the Dispute Settlement Understanding will not be part of the single undertaking — i.e. that they will not be tied to the overall success or failure of the other negotiations mandated by the Ministerial Declaration. Among the proposals for reform currently under negotiation, there is a proposal to introduce a system of permanent panelists, proposals regarding the composition and mandate of the Appellate Body, proposals concerning the transparency of the proceedings, proposals concerning the special and differential treatment for developing country Members and proposals to improve the WTO mechanism to ensure implementation of recommendations and rulings adopted by the DSB.

¹⁴² Feciliano, F. and Van den Bossche, P., *op.cit.*, 300.

7. CASE STUDIES

1. The Government of the Republic of Newland, a developing country, is confronted with mounting domestic protest against its membership of the WTO. In the words of one opposition leader, membership of the WTO has brought Newland “nothing but misery and neo-colonial oppression”. The opposition parties have asked for a debate in Parliament on this issue and Newland’s Prime Minister has agreed to this request. You have been instructed by the Prime Minister’s Office to prepare speaking notes for the PM outlining the objectives, functions, institutions and decision-making procedures of the WTO. The speaking notes also have to cover the basic rules and disciplines of WTO law. The Prime Minister wants to be briefed, in particular, on the question whether both from an institutional and a substantive perspective the WTO takes into account the special interests and needs of developing country Members, such as Newland.
2. Shortly before the WTO debate in the Parliament of Newland, the Kingdom of Richland announced that it had taken a number of trade measures to protect its domestic toy industry. Until the late 1980’s the Kingdom of Richland was a major producer and exporter of toys made of wood or high-quality plastic. At that time, over 100.000 people were employed in the toy industry in Richland. Since the early 1990’s, however, the sales of toys produced in Richland have dropped considerably both in Richland and in the export markets. Children worldwide seem to prefer computer games to miniature trucks or dolls. Moreover, low priced wooden and plastic toys produced in developing countries such as Newland constitute increasingly tough competition for toys produced in Richland. If domestic sales and exports of toys produced in Richland do not pick up quickly, many toy manufacturers in Richland, which still employ over 25.000 people, will either disappear or lay off many workers. To prevent this from happening, the Government of Richland increased customs duties on all toys to 30 per cent *ad valorem*. The customs duties applied before ranged from 0 per cent (for computer games) to 15 per cent (for wooden toys). During the Uruguay Round negotiations Richland agreed to limit customs duties on all toys (except wooden toys) to 10 per cent *ad valorem*. Richland does not apply the increase in customs duties to imports from the Republic of Friendland, a developing country with which Richland has close political and economic ties. Richland also limits the importation of computer games to 10.000 units per year. Finally, Richland enacts legislation imposing additional safety requirements on all imported toys. Under the new legislation, allegedly intended to protect the health of children, all imported toys will have to be made of non-toxic materials. In recent years Newland has become an important exporter of toys to Richland¹⁴³ and Newland’s export of toys are seriously affected by the measures now taken by Richland. No less than 50.000 jobs are, directly or indirectly, at risk. The Prime Minister would, therefore like you to make a rough first assessment of the WTO consistency of these measures.

¹⁴³ It should be noted that over the last three years Newland’s toy exports amounted on average to 12 per cent of the toy imports of Richland.

He also wants to know whether Newland or its main toy producer could have recourse to the WTO dispute settlement system or the International Court of Justice to challenge these measures. He furthermore wants to know whether Newland can count on any legal assistance to help it prepare its case at the WTO. Finally, he wants you to find out what remedies are available for Newland if Richland were found to have acted inconsistently with its WTO obligations. He expects you to brief him orally on your findings within the next 24 hours.

8. FURTHER READING

8.1 Books and Articles

- WTO Secretariat, *Guide to the Uruguay Round Agreements* (Kluwer Law International, 1999)
- WTO Secretariat, *Guide to Dispute Settlement* (Kluwer Law International, 2002)
- Das, B.L., *The World Trade Organisation: A Guide to the Framework for International Trade* (Third World Network, 1999)
- Hoekman, B. and Kostecki, M., *The Political Economy of the World Trading System*, 2nd edition (Oxford University Press, 2001).
- Jackson, J., *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition (The MIT Press, 1997).
- Lacarte-Muró, J., and Gappah, P., “Developing Countries and the WTO Legal and Dispute Settlement System: a View From the Bench”, *Journal of International Economic Law*, 2000, 395 - 401
- Bourgeois, J., “Some reflections on the WTO Dispute Settlement System From a Practitioner’s Perspective”, *Journal of International Economic Law*, 2001, 145 - 154
- Iwasawa, Y., “WTO Dispute Settlement as Judicial Supervision”, *Journal of International Economic Law*, 2002, 287 - 305
- Gabilondo, J., “Developing Countries in the WTO Dispute Settlement Procedures Improving their Participation”, *Journal of World Trade*, 2001, 483 – 488
- Footer, M., “Developing Country Practice in the Matter of WTO Dispute Settlement”, *Journal of World Trade*, 2001, 55 - 98
- Marceau, G., “Rules on Ethics for the New World Trade Organization Dispute Settlement Mechanism — The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes”, *Journal of World Trade*, 1998, 57 – 98
- Mavroidis, P., “Remedies in the WTO Legal System: Between a Rock and a Hard Place”, *European Journal of International Law*, 2000, 763 – 813.
- Feliciano, F. and Van den Bossche, P., “The Dispute Settlement System of the World Trade Organization: Institutions, Process and Practice”, in Blokker, M. and Schermers, H. (eds.), *Proliferation of International Organizations* (Kluwer Law International, 2001), 297-350.

8.2 Documents and Information

For information on WTO activities, see www.wto.org. Official WTO documents can be obtained by searching on the WTO’s online document database, available at: <http://docsonline.wto.org>. A very useful website on WTO dispute settlement is www.worldtradelaw.net.